88-692

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

ROGER TEETER AND JENNIFER TEETER
D/B/A SKY'S THE LIMIT,
PETITIONER.

VS.

GRAVITY GUIDANCE, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

The questions presented for review are:

1. Was it permissible for the United States District Court for the Western District of Washington in ruling on a motion for summary judgment and the Court of Appeals for the Federal Circuit on appeal from that ruling to disregard consideration of the issue of obviousness under Rule 35 U.S.C. § 103 in holding that the patent was valid?

2. Was it permissible for the District Court for the Western District of Washington on a motion for summary judgment by Teeter on the ground of patent invalidity and the Court of Appeals for the Federal

Circuit on appeal from the ruling on that motion to disregard the claims in the patent in holding the patent to be valid?

3. Was it proper for the Court of Appeals for the Federal Circuit to not consider the prior art of record with reference to claim 1 of the Martin patent when all of the evidence in the case was documentary in the form of prior U.S. patents and there was no testimony despite the ruling of the U.S. Supreme Court in Dennison Manufacturing Company v. Panduit Corp., 106 US 1578, 229 USPQ 478 (Sup. Ct. 1986)?

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Decision of the Court of Appeals for the Federal Circuit decided July 1, 1988 in appeal No. 88-1174. . . . . 4a

APPENDIX C:
Dissenting opinion of decision of the Court of Appeals for the Federal Circuit decided July 1, 1988 in appeal No. 88-1174 . . . . . 7a

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IN THE
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ROGER TEETER AND JENNIFER TEETER
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

Copies of the opinions below are attached in APPENDIX NO. 1 to this petition as follows:

1. Order of the United States District Court for the Western District of Washington on motions for

summary judgment dated June 10, 1986 (APPENDIX A);

2. Decision of the Court of Appeals for the Federal Circuit decided July 1, 1988 (APPENDIX B and APPENDIX C);

3. Denial of Petition for Rehearing by the Court of Appeals for the Federal Circuit dated July 28, 1988 (APPENDIX D);

4. Denial of Suggestion for Rehearing in Banc dated August 11, 1988 (APPENDIX E).

GROUNDS FOR JURISDICTION

1. The date of the decision by the U.S. Court of Appeals for the Federal Circuit sought to be reviewed and the time of its entry is July 1, 1988.

2. The date of the order denying a rehearing was July 28, 1988.

JURISDICTION

The jurisdiction of the Supreme Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution,
Article 1, Section 8

> To promote the Progress of . . . useful Arts, by securing for limited Times to . . .

> Inventors the exclusive Right to their . . . Discoveries . . . .

U.S. Constitution, Amendment V

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

35 U.S.C. § 103

> **Conditions for patentability; non-obvious subject matter**
>
> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U.S.C. § 112 - portion thereof

> **Specification**
>
> . . . .
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Federal Rules of Civil Procedure 52(a) - portion thereof

> (a) **Effect.** . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

The suit for infringement of U.S. patent No. 3,380,447 of Robert M. Martin (APPENDIX F) was instituted by Gravity Guidance, Inc. ("Gravity Guidance") against Roger Teeter and Jennifer Teeter, d/b/a Sky's The Limit ("Teeter") in United States District Court for the Western District of Washington No. C83-824T. The basis for jurisdiction of the District Court was 28 U.S.C. § 1400(b).

The patent application resulting in the Martin patent was filed on October 19, 1965. It relates to an ankle holding device that was stated to be used for supporting an individual in an inverted position and was sometimes known as an inversion

boot. The boot consisted of two rigid, substantially semicylindrical jaws connected by a hinge which jaws could be swung together around the user's leg and secured in position by a latch. One of the jaws had a hook on it opening upward that could be hooked over a bar for enabling the user to hang head down. The purpose of such hanging was to:

1. lengthen the body,

2. separate the spaces between the vertebrae of the spine;

3. aid in eliminating sagging of the internal abdominal organs;

4. decompress the body;

5. aid circulatory exchange; and

6. readjust the lines of stress upon the body.

The leg holder manufactured and sold by by Teeter differed from the boot disclosed in the Martin patent by having two curved flexible pieces of plastic instead of rigid jaws, which plastic pieces were rigidly connected by a metal connector instead of by a hinge. The pieces of plastic could be flexed away from each other as in old-fashioned puttees to provide an opening to receive the leg and then the edges of the pieces of plastic were overlapped and fastened together by adjustable length fasteners. A hook was carried by the metal connector.

During the presentation of the case to the District Court and on appeal, Gravity Guidance relied on

only claim 1 of the patent as being infringed, which claim is as follows:

> 1. In a device of the class described,
>
> an inversion boot adapted for attachment to a person's leg including a first jaw member having opposite ends and a second jaw member having opposite ends,
>
> said first jaw member hingedly secured at one of its ends to one end of said second jaw member,
>
> means detachably securing said other end of said first jaw member to said other end of said second jaw member,
>
> and a hook means secured to one of said first and second jaw members.

It will be noted that this claim only relates to an inversion boot for attachment to a person's leg and does not specify its use environment. The claim specifies <u>two</u> jaws <u>connected by a hinge</u> which Teeter's leg holders do not have.

In the District Court action, Gravity Guidance brought a motion for summary judgment on the ground that Teeter's boots infringed the patent and Teeter brought a motion for summary judgment on the ground that the patent was invalid over several prior United States patents, the most pertinent ones being Daniels et al. U.S. patent No. 1,693,810, issued December 4, 1928, (APPENDIX G) and Gibson U.S. patent No. 2,209,310, issued July 30, 1940 (APPENDIX H).

The Daniels et al. patent disclosed a table having ankle-gripping clamps that could be swung to place the patient lying on the table in a head-down position to aid in restoring misplaced organs to proper

position and relieve pressure of such misplaced organs.

The Gibson patent disclosed leg-holding devices having hooks for tensioning the user's legs which were shown as being used on a therapeutic table for stretching the patient to reduce the pressure on the nerves which branch out between various vertebrae of the spinal column. The leg straps or clamps of the Gibson patent are much more similar to the leg holders of Teeter than either the Gibson or Teeter leg holders are to the boots disclosed in the Martin patent.

A most important consideration is that claim 1 of the Martin patent quoted above relates only to ankle holders used to hold the legs in

effecting a body-stretching operation and the Gibson patent discloses leg holders used for precisely the same purpose.

On June 10, 1986, the District Court entered an order (APPENDIX A) stating in part:

> 2. Defendants did not literally infringe upon Plaintiff's patent rights.
> 3. Under the Doctrine of Equivalents, Defendants infringed upon the patent rights of Plaintiff.
> . . . .
> 5. The patent rights asserted by Plaintiff are valid.

From that order Teeter appealed to the Court of Appeals for the Federal Circuit which entered a decision by two judges of a three-judge panel dated July 1, 1988 (APPENDIX B) stating in part:

OPINION

> . . . Teeter's primary argument on appeal is that the claimed invention is anticipated by the 2,209,310 (Gibson) patent. But a patent is presumed valid, see 35 U.S.C. § 282, and when Martin is construed in light of the specification it is clear that there are significant differences between the Gibson and Martin devices. Accordingly, the district court correctly determined that Teeter had failed to carry its burden to establish anticipation. See, e.g., Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984) (anticipation is a factual determination which is reviewed under the clearly erroneous standard).

One of the judges of the three-judge panel dissented (APPENDIX C).

A Combined Petition for Rehearing and Suggestion for Rehearing in Banc was filed, both of which were denied.

Neither the order of the District Court nor the decision of the Court of Appeals for the Federal Circuit made any reference to the statute 35 U.S.C. § 103 (supra page 4) specifying that a patent be refused if the subject matter is obvious, or gave any indication that the issue of obviousness had been considered by two judges of the Court. Only the question of novelty, that is, anticipation under 35 U.S.C. § 102 was considered by such judges. What the District Court considered is not revealed by his order of June 10, 1986 (APPENDIX A).

The third judge of the Court of Appeals for the Federal Circuit, Judge Michel, did consider the issue of obviousness and stated:

> I am not convinced, however, that the sole issue on appeal with respect to validity was anticipation. The appellants did make the basic argument that, if the courts which had previously considered the Martin patent had had Gibson before them in addition to the previously-cited prior art, the Martin patent would have been found invalid. To me this is necessarily an obviousness argument. Furthermore, in my view, Gibson, together with the previously-cited prior art, is more than enough to render the claimed invention obvious to one of ordinary skill in the art.

ARGUMENT

Obviousness

In its order (APPENDIX A) from which the appeal to the Court of Appeals for the Federal Circuit was taken, the District Court did not consider at all the question of

obviousness under 35 U.S.C. § 103, but simply stated:

> 5. The patent rights asserted by Plaintiff are valid.

In Graham v. John Deere Co. of Kansas City et al., 383 US 1, 148 USPQ 459 (Sup. Ct. 1966), the Supreme Court made the following statements referring to pages in the report in 148 USPQ 459 (emphasis supplied):

Page 461, column 2:

> . . . Congress has for the first time expressly added a third statutory dimension to the two requirements of novelty and utility that had been the sole statutory test since the Patent Act of 1793. This is the test of obviousness, i.e., "whether the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the

manner in which the invention was made." Patent Act of 1952, 66 Stat. 798, 35 U.S.C. § 103 (1964 ed.)

Page 464, column 2, bottom:

The 1952 Act.

The Act sets out the conditions of patentability in three sections. An analysis of the structure of these three sections indicates that patentability is dependent upon three explicit conditions: novelty and utility as articulated and defined in § 101, and § 102, and nonobviousness, the new statutory formulation, as set out in § 103.

Page 465, column 2:

The section is cast in relatively unambiguous terms. Patentability is to depend, in addition to novelty and utility, upon the "non-obvious" nature of the "subject matter sought to be patented" . . . .

Page 466, column 1:

It is undisputed that this section was, for the first time, a statutory expression of an additional requirement for

> patentability, originally expressed in Hotchkiss.

Page 467, column 1, top:

> While the ultimate question of patent validity is one of law, A. & P. Tea Co. v. Supermarket Corp., supra, at 155, 87 USPQ at 307, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; . . . .

Thus the Supreme Court has held that consideration of "obviousness" under 35 U.S.C. § 103 is mandatory.

Neither the District Court nor the Court of Appeals for the Federal Circuit considered the issue of obviousness. On the appeal Teeter's Reply Brief, at page 2, asked that the Court of Appeals for the Federal Circuit consider the question of

obviousness as follows (emphasis supplied):

> The paramount issue is whether claim 1 of the Gravity patent is anticipated by or is obvious in view of the Gibson patent reference which was not cited by the Patent and Trademark Office against the application resulting in the Gravity patent nor was it considered by any of the courts in which infringement suits for infringement of the Gravity patent were brought.

and at the middle of page 12:

> . . . throughout this case Teeter has argued that as a matter of law the prior art, including the Gibson patent, anticipate claim 1 of the Gravity patent or claim 1 is obvious over that patent . . . . As this Court stated in Gardner v. TEC Systems, Inc., et al., 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), at USPQ 782, column 2 (emphasis supplied):
>
> > A conclusion on obviousness is one of law and subject to full and independent review in this court. Sarkisian v. Winn-Proof Corp., 688 F.2d 647,

> 651 (9th Circ. 182). Our task is thus to consider the facts, either as properly found by the factfinder below or as stipulated to or otherwise uncontested by the parties, and reach our own conclusion on obviousness. We then either affirm the trial court if we agree with its conclusion, reverse if we do not, or vacate and remand for new or additional findings if, in our view, the record lacks facts essential to formulating a conclusion.

Claims

Neither the District Court nor the Court of Appeals for the Federal Circuit considered the claims of the Martin patent.

For the District Court and the Court of Appeals for the Federal Circuit to ignore the claims of the Martin patent is untenable. Claims in a patent are a requirement of 35

U.S.C. § 112 (supra page 5) and they are the heart of the patent. In the case of Sjolund v. Musland, 6 USPQ2d 2020 (Fed. Cir. 1988), the Court of Appeals for the Federal Circuit considered the claims of the patent involved in the suit at considerable length. The Court stated at the middle of column 2 on page USPQ2d 2027 (emphasis partially supplied):

> When claim construction is required, claims are construable, as above indicated, in light of the specification, United States v. Adams, 383 U.S. 39, 49, 148 USPQ 479, 482 (1966), yet "[t]hat claims are interpreted in light of the specification does not mean that everything expressed in the specification must be read into all the claims." Raytheon Co. v. Roper Corp., 724 F.2d at 957, 220 USPQ at 597.

The decision of the Court of Appeals for the Federal Circuit in the present case made reference only to the specification and not the claims stating (emphasis supplied):

> . . . when Martin is construed in light of the specification it is clear that there are significant differences between the Gibson and Martin devices.

The Sjolund v. Musland decision of the Court of Appeals for the Federal Circuit then continued (emphasis supplied):

> If everything in the specification were required to be read into the claims, or if structural claims were limited to devices operated precisely as a specification-described embodiment is operated, there would be no need for claims. Nor . . . would a basis remain for the statutory necessity that an applicant conclude his specification with "claims particularly pointing out and distinctly claiming the subject matter which the applicant

> regards as his invention." 35 U.S.C. § 112.

The Court then emphasized (emphasis partially supplied):

> It is the claims that measure the invention. SRI International, 775 F.2d at 1121, 227 USPQ at 585. As our opinion in SRI makes clear, the claims define the invention.

In view of this ruling of the Court of Appeals for the Federal Circuit in the Sjolund v. Musland decision, how could that very court disregard the claims of the Martin patent in its decision in this case?

The dissenting opinion in the present case stated (APPENDIX C, page 9a, middle):

> It is the claims of the Martin patent which provide the concise, operative definition of the invention and, therefore, it is to the words of the claims that we must look to determine the scope of the patented invention. Autogiro

Co. of America v. United States, 384 F.2d 391, 395-96, 155 USPQ 697, 701 (Ct. Cl. 1967).

Court's Interpretation of Prior Art

In the present case the trial court did not discuss the prior art at all. The Court of Appeals for the Federal Circuit stated the proper procedure to be followed by that court under such circumstances in Kimberly-Clark Corporation v. Johnson & Johnson and Personal Products Company, 745 F.2d 1437, 223 USPQ 603 (Fed. Cir. 1984), at the middle of column 1 on page USPQ 610:

> Since the trial court's opinion lacks a comparison of the invention of Roeder's claims with the prior art, we have made it ourselves . . . .

This procedure is in accord with decisions by the Court of Appeals for

the 7th Circuit to the same effect as follows:

The Taylor-Reed Corporation v. Mennen Food Products, Inc., et al., 324 F.2d 108, 139 USPQ 143, 145 (7th Cir. 1963) (emphasis supplied):

> The district court made a number of findings of fact contrary to the conclusion we have reached. Since we are able to resolve this question on the basis of documentary evidence, the findings of the district court on this issue are deprived of the degree of finality which would otherwise attach under Rule 152(a), Federal Rules of Civil Procedure, 28 U.S.C.A. Kiwi Coders Corporation v. Acro Tool & Die Works, 7 Cir., 250 F.2d 562, 568, 116 USPQ 2, 6 (1958), and cases cited therein. The documentary rule stated in Kiwi Coders was cited with approval in Nicholson v. Carl W. Mullis Engineering and Mfg. Co., 4 Cir., 315 F.2d 532, 536, 137 USPQ 13, 16 (1963). See, Becker v. Webcor, Inc., 7 Cir., 289 F.2d 357 361, 129 USPQ 111, 114 (1961), cert. denied, 368 U.S. 970, 132 USPQ 703; Armour & Co. v. Wilson & Co., 7 Cir., 274 F.2d 143, 152, 124 USPQ 115, 121-122 (1960). We hold, therefore, that such contrary

findings on this proposition must be set aside.

Nasco Incorporated v. Vision-Wrap, Inc., 352 F.2d 905, 147 USPQ 297, 299 (7th Cir. 1965) (emphasis supplied):

> The defendant offered no testimony, expert or otherwise, on the prior patent art. The appealed decision rests entirely on documentary evidence and physical exhibits. Consequently, the court's findings, in so far as they concern the use made of prior art, the nature of the improvement made over prior art, and the operational functions and characteristics of the patented structure and the accused device, are deprived of the degree of finality which would otherwise attach under Rules 52(a) of the Federal rules of Civil Procedure (28 U.S.C.A.). We are in as good a position as the trial court to examine and evaluate the evidence and make the necessary determinations ourselves. Charles Peckat Mfg. Co. v. Jacobs, 7 Cir., 178 F.2d 794, 802, 84 USPQ 4, 11; Kiwi Coders Corporation v. Acro Tool & Die Works, 7 Cir., 250 F.2d 562, 568, 116 USPQ 2, 6; Armour & Co. v. Wilson & Co., 7 Cir., 274 F.2d 143, 151-157, 124 USPQ

115, 121-126; and Welsh Co. v. Chernivsky, 7 Cir., 342 F.2d 586, 588, 144 USPQ 288, 290.

The case of Dennison Manufacturing Company v. Panduit Corp., 106 US 1578, 229 USPQ 478 (Sup. Ct. 1986) held that the Court of appeals for the Federal Circuit must consider Rule 52(a) of the Federal Rules of Civil Procedure, but in the present case the District Court made no findings of fact but simply ultimate conclusions of law. Consequently, Rule 52(a) does not apply to this case despite the reference of the Court of Appeals for the Federal Circuit to the case of Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Company et al., 730 F.2d 1452, 221 USPQ 481 (Fed. Cir. 1984).

The Lindemann Decision

In the present case, the District Court made no finding of fact bearing either on the issue of anticipation (35 U.S.C. § 102) or on the issue of obviousness (35 U.S.C. § 103). In the Lindemann decision on the other hand, the District Court made 60 findings of fact (221 USPQ at page 484, column 1, bottom, and column 2, middle). Recognizing the "clearly erroneous" standard of Fed.R.Civ.P. 52(a), the court stated at the middle of column 1 on page 485:

> However salutary, the rules governing review do not envision an appellate court shirking its duty to reverse an appealed judgment that is clearly based on legal error and unsupported by evidence in the record.
> . . .
> . . . the language in an opinion, or in a set of findings and conclusions, may

> indicate that numerous harmful errors of law produced an erroneous conclusion . . . .

The court further explained the duty of an appellate court which was not followed by a majority of the court in the present instance, as follows at 221 USPQ at page 485, top of column 2 (emphasis supplied):

> In deciding the issue of anticipation, the trier of fact must identify the elements of the claims, determine their meaning in light of the specification and prosecution history, and identify corresponding elements disclosed in the allegedly anticipating reference.

In the Lindemann case also, the trial court, as well as the Court of Appeals for the Federal Circuit, considered the issue of obviousness at 221 USPQ page 486, column 1, in connection with which the appellate court stated at

221 USPQ page 487, column 2, top (emphasis supplied):

> . . . the district court stated that it had considered the facts in light of the inquiries mandated by Graham v. John Deere & Co., 383 U.S. 1, 148 USPQ 459 (1966) . . . .

The Court of Appeals for the Federal Circuit did not follow suit in the present case.

Obviousness is a Matter of Law

As stated by the Court of Appeals for the Federal Circuit in In re Fine, 5 USPQ2d 1596 (Fed. Cir. 1988) at page 1598, top of column 2:

> . . . an obviousness determination is not reviewed under the clearly erroneous standard applicable to fact findings, Raytheon Co. v. Roper Corp., 724 F.2d 951, 956, 220 USPQ 592, 596 (Fed. Cir. 1983); it is "reviewed for correctness or error as a matter of law." In re De Blauwe, 736 F.2d 699,

703, 222 USPQ 191, 195 (Fed. Cir. 1984).

It is respectfully submitted that since the question of obviousness is one of law and there was only documentary evidence in the case, the Court of Appeals for the Federal Circuit should have followed the decisions discussed above and made its own determination as to the validity of claim 1 of the Martin patent based by applying the documentary evidence to the wording of that claim in accordance with the third requirement of the statute 35 U.S.C. § 103 as to obviousness.

CONCLUSION

For the reasons discussed above, the judgment of the United States Court of Appeals for the

Federal Circuit should be vacated and this case should be remanded to that court for further consideration in light of the following decisions:

Graham v. John Deere Co. of Kansas City et al., 383 US 1, 148 USPQ 459 (Sup. Ct. 1966);

Sjolund v. Musland, 6 USPQ2d 2020 (Fed. Cir. 1988);

Kimberly-Clark Corporation v. Johnson & Johnson and Personal Products Company, 745 F.2d 1437, 223 USPQ 603 (Fed. Cir. 1984).

The decision of Novicky v. Syntex Opthalmics, 225 USPQ 792 (Sup. Ct. 1985) stated:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of Marrese v. American Academy of

Orthopaedic Surgeons, 470 U.S. -- (1985). Justice Powell took no part in the consideration or decision of this case.
Opinion below: 223 USPQ 695.

DATED this 21st day of October, 1988.

Respectfully submitted,

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APPENDIX NO. 1

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Dissenting opinion of decision of the Court of Appeals for the Federal Circuit decided July 1, 1988 in appeal No. 88-1174 . . . . . 7a

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IN THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON
AT TACOMA

GRAVITY GUIDANCE, INC.,	)	
	)	
Plaintiff,	)	No.
	)	C83-824T
vs.	)	Entered
	)	Order
ROGER TEETER and	)	Docket
JENNIFER TEETER, d/b/a	)	June 10,
SKY'S THE LIMIT.	)	1986
Defendant.	)	By Deputy

THIS MATTER comes on before the above-entitled Court upon the following motions: Plaintiff's Motion for Partial Summary Judgment on the issue of patent infringement, and Defendants' Motion for Partial Summary Judgment on the issue of the validity of the patent in suit.

Having considered the entirety of the records and file herein, and

having heard oral argument of counsel, the Court finds and rules as follows:

1. Regarding the motions for partial summary judgment, there are no genuine issues of material fact and judgment may be made as a matter of law.

2. Defendants did not literally infringe upon Plaintiff's patent rights.

3. Under the Doctrine of Equivalents, Defendants infringed upon the patent rights of Plaintiff.

4. The infringement of Defendants was willful.

5. The patent rights asserted by Plaintiff are valid.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion

for Partial Summary Judgment is GRANTED; and it is further

ORDERED that Defendants' Motion for Partial Summary Judgment is DENIED.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 10th day of JUNE 1986.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

88-1174

GRAVITY GUIDANCE, INC.,

Plaintiff-Appellee,

v.

ROGER TEETER and JENNIFER TEETER d/b/a SKY'S THE LIMIT,

Defendants-Appellants.

DECIDED: July 1, 1988

Before ARCHER, MAYER, and MICHEL, Circuit Judges.

PER CURIAM.

DECISION

The decision of the United States District Court for the Western

District of Washington, No. C83-824T (W.D. Wash. 1986), on cross-motions for partial summary judgment holding plaintiff's patent valid and infringed, is affirmed.

OPINION

Our review of the record convinces us that the district court did not err in its determination that (1) there were no genuine issues of material fact, (2) the 3,380,447 (Martin) patent had not been shown to be invalid, and (3) Teeter had willfully infringed the Martin patent. Teeter's primary argument on appeal is that the claimed invention is anticipated by the 2,209,310 (Gibson) patent. But a patent is presumed

valid, see 35 U.S.C. § 282, and when Martin is construed in light of the specification it is clear that there are significant differences between the Gibson and Martin devices. Accordingly, the district court correctly determined that Teeter had failed to carry its burden to establish anticipation. See, e.g., Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 1458, 221 USPQ 481, 485 (Fed. Circ. 1984) (Anticipation is a factual determination which is reviewed under the clearly erroneous standard).

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v.

ROGER TEETER and JENNIFER TEETER d/b/a SKY'S THE LIMIT,

Defendants-Appellants.

MICHEL, Circuit Judge, dissenting.

In its grant of summary judgment, the district court simply stated that "[t]he patent rights asserted by Plaintiff are valid." This conclusion the majority affirms solely on the ground that the Teeters

failed to carry their burden to establish anticipation of the Martin claims by the prior art Gibson patent. I am not convinced, however, that the sole issue on appeal with respect to validity was anticipation. The appellants did make the basic argument that, if the courts which had previously considered the Martin patent had had Gibson before them in addition to the previously-cited prior art, the Martin patent would have been found invalid. To me this is necessarily an obviousness argument. Furthermore, in my view, Gibson, together with the previously-cited prior art, is more than enough to render the claimed invention obvious to one of ordinary skill in the art.

Even if I confine my views on validity to the issue of anticipation, I do not agree with the majority that the differences between Gibson and the claims of Martin are "significant" and can be used to distinguish Martin as patentable. Rather, it appears to me that for each feature recited in the first (and only independent) claim of Martin there exists corresponding structure in Gibson.

It is the claims of the Martin patent which provide the concise, operative definition of the invention and, therefore, it is to the words of the claims that we must look to determine the scope of the patented invention. Autogiro Co. of America v. United States, 384 F.2d 391, 395-96, 155 USPQ 697, 701 (Ct. Cl. 1967).

Particular limitations or embodiments appearing in the specification should not be read into the claims, Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 867, 228 USPQ 90, 93 (Fed. Cir. 1985), although the descriptive portion of the patent specification can properly be relied upon to aid in an interpretation of the terms contained in the claims. Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448, 452, 227 USPQ 293, 296 (Fed. Cir. 1985). Moreover, claim interpretation is a question of law, and this court need not defer to the district court under standards appropriate to factual determinations. Loctite, 781 F.2d at 866, 228 USPQ at 93. Accordingly, only differences which relate to the limitations stated in the claims, as

those limitations are properly interpreted, can be used to determine whether legally significant differences exist between Gibson and Martin.

The appellee basically concedes structural identify of its boot with the Gibson device, but argues, relying on the preamble of claim 1 and the patent specification, that its boot pertains specifically to "inversion" or "hanging" and thus is distinguishable from Gibson. The preamble of Martin's first claim recites: "In a device of the class described, an inversion boot . . . ." The claims proceed to describe the structure of the Martin boot. Appellee thus asserts that the denomination of the Martin structure

as an "inversion boot" means that the claimed structure is an ankle device for use in "hanging a person from an inverted position from a horizontal bar." However, Martin's first claim does not mention "inversion" as uniquely accomplished by "hanging." Moreover, Gibson also discloses a device which, although not said to be for "hanging," nonetheless acts to place a set of forces on the body which are "inverse" to those normally applied by gravity to the body while standing.

Had this been the first time that this patent was subjected to judicial review, it might be proper to find that Gibson does not anticipate Martin by interpreting the term "inversion" in the patent claims by

reference to the specification's limitation of "inversion" to "hanging" upside down, in contrast to the general "inversion" of the direction of the usual forces of gravity on the body as shown by Gibson. However, the litigation history of the Martin patent shows that it would be improper to incorporate "hanging" as used in the specification into the "inversion" limitation contained in the claim of Martin.

In prior litigation involving the Martin patent, it was specifically determined that Martin had claimed a specific ankle boot structure and that the "hanging" aspect emphasized by the appellee here was not viewed as significant. For example, in one prior suit (in which Gibson was not

cited as prior art) it was observed that:

> Plaintiff, however, is not claiming to have patented the idea of hanging upside down and such would be ridiculous since "obviously anyone knows that you can suspend yourself upside down by taking a rope and tying it to a higher object." Martin v. Wittmer, No. 82-71298, 220 USPQ 24 (E.D. Mich. 1982). Rather, plaintiff has patented a means of hanging upside down. (emphasis in original)
>
> The prior art submitted by defendants shows that the concept of treating back problems by inversion is not a unique method of treatment. The same prior art shows, however, that plaintiff's ankle holders, a device to achieve the inversion, are unique and nonobviousness [sic] as a means of treatment.

Gravity Guidance, Inc. v. Weseman, 220 USPQ 953, 957 (D. Minn. 1983) (portion of magistrate's report on validity as adopted by the district court, 220 USPQ 1038, 1040 (D. Minn. 1983)).

Confronted in the earlier suits with the prior art which disclosed "hanging" but not their disclosed structure, appellee conceded that the prior art disclosed "hanging" but argued that its invention should be distinguished from that "hanging" art on the basis of unique structure. Now, confronted with newly-discovered prior art which discloses its structure, the appellee argues that its claims are limited to that structure as used solely for "hanging." In my view, the appellee should not be allowed to benefit from such inconsistent arguments, but should be bound both by prior rulings on limitations and present concessions on identity of structure.

Furthermore, a defendant is not precluded from attempting to show invalidity of a patent simply because that patent has not been shown invalid in prior suits, Allen Archery, INc. v. Browning Manufacturing Co., 819 F.2d 1087, 1091, 2 USPQ 2d 1490, 1492-93 (Fed. Circ. 1987), especially when newly-discovered prior art not at issue in the prior suits is presented. Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 n.5, 218 USPQ 969, 974 n.5 (Fed. Cir. 1983).

Under the foregoing view of how the claims of Martin, as a matter of law, should have been interpreted, it appears quite clear that appellants produced a previously uncited reference which, unlike the references cited during prosecution or prior

litigation of the Martin patent, disclosed all of the structure set forth in the claims. In my opinion, Gibson anticipates Martin and the court below should have so found. I would reverse the district court on the issue of validity; therefore, I dissent.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1174

GRAVITY GUIDANCE, INC.,

Plaintiff-Appellee,

v.

ROGER TEETER and JENNIFER TEETER
d/b/a SKY'S THE LIMIT,

Defendants-Appellants.

Before ARCHER, MAYER, and MICHEL, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for

rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT:

7/28/88 /S/
Date Francis X. Gindhart, Clerk

cc: Mr. Robert W. Beach
Mr. Bruce W. McKee

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
July 28, 1988
Francis X. Gindhart
Clerk

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1174

GRAVITY GUIDANCE, INC.,

Plaintiff-Appellee,

v.

ROGER TEETER and JENNIFER TEETER
d/b/a SKY'S THE LIMIT,

Defendants-Appellants.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT:

8/11/88 /S/
Date Francis X. Gindhart, Clerk

cc: Mr. Robert W. Beach
Mr. Bruce W. McKee

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
August 11, 1988
Francis X. Gindhart
Clerk

88-692

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

ROGER TEETER AND JENNIFER TEETER
D/B/A SKY'S THE LIMIT,
PETITIONER.

VS.

GRAVITY GUIDANCE, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX NO. 2 (BOUND SEPARATELY)

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Of Counsel:

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PAGE NO.

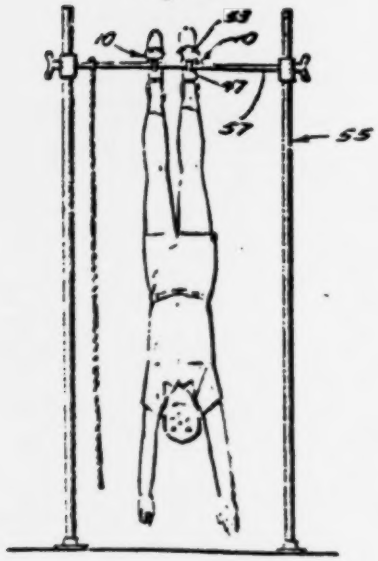
APPENDIX F:
Martin U.S. patent No. 3,380,447 . . . . . 1 AP

APPENDIX G:
Daniels et al. U.S. patent No. 1,693,810 . . 4 AP

APPENDIX H:
Gibson U.S. patent No. 2,209,310 . . . . . 10 AP

April 30, 1968 R. M. MARTIN 3,380,447
ANKLE DEVICE FOR SUPPORTING AN INDIVIDUAL IN AN INVERTED POSITION
Filed Oct. 19, 1965

Fig. 1



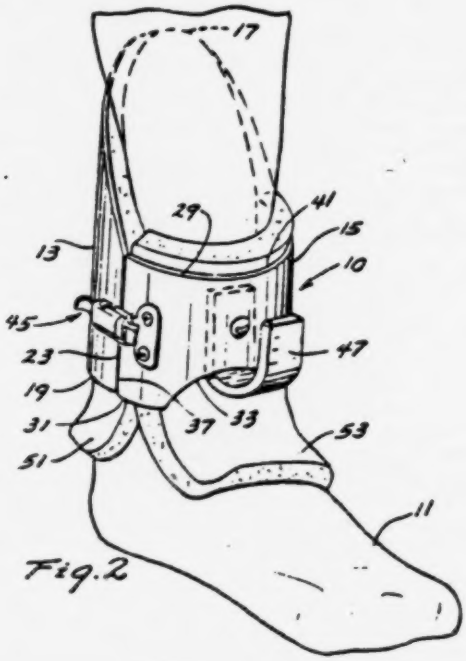


Fig. 2

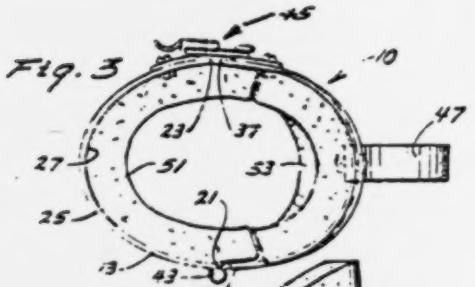


Fig. 3

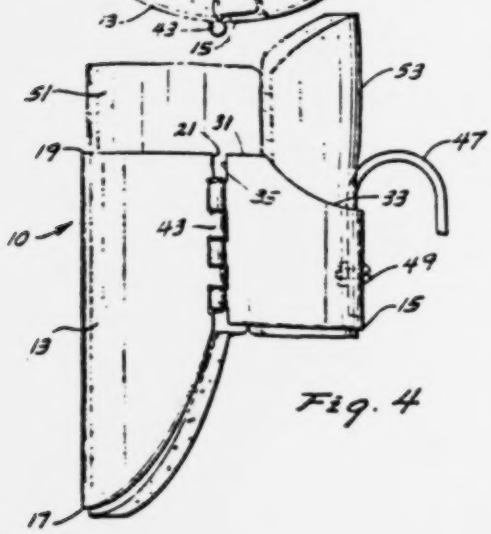


Fig. 4

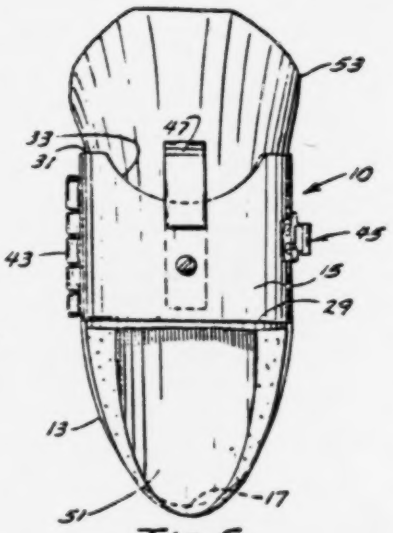


Fig. 5

INVENTOR.
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BY
Dick, Zaslow, McKie & Thomas
ATTORNEYS

United States Patent Office

3,380,447

Patented Apr. 30, 1968

3,380,447

ANKLE DEVICE FOR SUPPORTING AN INDIVIDUAL IN AN INVERTED POSITION

Robert M. Martin, 90 N. Hudson Ave., Pasadena, Calif. 91101

Filed Oct. 19, 1965, Ser. No. 497,767

9 Claims. (Cl. 128—75)

This invention relates to an ankle device and more particularly to an ankle device for supporting an individual in an inverted position.

The anatomical, physiological and mechanical reasons for supporting an individual in an inverted position from the individual's lower limbs are as follows: (1) lengthen the body; (2) separate the joint spaces, especially the intervertebral joint spaces; (3) to aid in the elimination of vascular and visceral ptosis; (4) to decompress the body; (5) to aid circulatory exchange; and (6) to readjust the lines of stress upon the body. In other words, the inversion of the individual's body serves to reverse the effects of erect posture.

Therefore, it is a principal object of this invention to provide an ankle device for supporting an individual in an inverted position.

A further object of this invention is to provide an ankle device for supporting an individual in an inverted position which is conveniently and quickly attached to the ankle.

A further object of this invention is to provide an ankle device for supporting an individual in an inverted position which is comfortable and safe.

A further object of this invention is to provide an ankle device for supporting an individual in an inverted position so that the full body weight can act as traction and as an elongating load through the long axis of the body.

A further object of this invention is to provide an ankle device for supporting an individual in an inverted position which is economical of manufacture, durable in use and refined in appearance.

These and other objects will be apparent to those skilled in the art.

This invention consists in the construction, arrangements, and combination of the various parts of the device, whereby the objects contemplated are attained as hereinafter more fully set forth, specifically pointed out in the claims, and illustrated in the accompanying drawings in which:

FIG. 1 is a front view illustrating an individual being supported in an inverted position by the ankle devices which are secured to the individual;

FIG. 2 is a front perspective view of the ankle device secured to an individual, the broken lines indicating the configuration of the posterior jaw member;

FIG. 3 is a bottom elevational view of the device;

FIG. 4 is a side elevational view of the device in an inverted position; and

FIG. 5 is a front elevational view of the device in an inverted position.

The numeral 10 generally designates the ankle device of this invention while the numeral 11 generally designates an individual's leg. Ankle device 10 includes jaw members 13 ad 15 hingedly secured together. Jaw member 13 includes a curved upper end 17, lower end 19, opposite ends 21 and 23, exterior surface 25 and interior surface 27.

Jaw member 15 includes an upper end 29, lower end 31 having a cut-away portion 33 formed therein, opposite ends 35 and 37, exterior surface 39 and interior surface 41. As best seen in FIGS. 3–5, ends 21 and 35 of jaw members 13 and 15 respectively are hingedly secured together at 43. As best seen in FIGS. 2 and 3, jaw member 13 and 15 are adapted to be detachably secured together

by means of snap lock means 45. An inverted, substantially U-shaped hook 47 is secured to jaw member 15 by means of bolt assembly 49. Preferably, hook 47, jaw member 13 and jaw member 15 are constructed of a metal material.

A layer of padding 51 is secured to the interior surface 27 of jaw member 13 by suitable adhesive or the like and may be comprised of rubber, leather, etc. As seen in FIG. 2, the lower end of padding 51 extends below the lower end 19 of jaw member 13 and extends slightly above the upper end 17 of jaw member 13. A layer of padding 53 is secured to the interior surface 41 of jaw member 15 by a suitable adhesive or the like and may be comprised of rubber, leather, etc. As best seen in FIG. 2, the lower end of padding 53 extends below the lower end 31 of jaw member 15 and the upper end of padding 53 extends slightly above the upper end 29 of jaw member 15.

The numeral 55 generally designates a horizontal bar assembly having a horizontal bar 57 mounted thereon.

When it is desired to support an individual in an inverted position, it is simply necessary to detachably secure an ankle device 10 to each of the ankles of the individual. The hinged relationship between jaw members 13 and 15 permits the device to be opened to facilitate the insertion of the individual's leg therein. Snap lock means 45 is then locked to prevent the device from inadvertently opening when in use. The individual then simply maneuvers his body on the horizontal bar assembly 55 until hooks 47 on each of the ankle devices extend over the horizontal bar 57 as illustrated in FIG. 1. The individual then hangs in a position as illustrated in FIG. 1 to permit the full body weight of the individual to act as a traction and as an elongated load through the long axis of the body. The layers of padding 51 and 53 prevent the ankle of the individual from coming into contact with any hard or sharp portion of the device to provide the individual with utmost comfort. The individual hangs in the inverted position for a predetermined length of time and then removes himself from the horizontal bar apparatus 57 whereupon the ankle devices are easily and quickly removed from the legs of the individual.

The configuration of jaw member 13 conforms to the posterior side of an individual's lower leg for maximum comfort and support. The curved upper end of jaw member 13 conforms to the configuration of the lower portion of an individual's calf.

The configuration of jaw member 15 conforms to the anterior side of an individual's lower leg for maximum comfort and support. Cut-away portion 33 of jaw member 15 partially receives a portion of the individual's ankle to permit the individual to walk when the device is attached to his ankle. Cut-away portion 33 of jaw member 15 also partially receives a portion of the individual's ankle when the individual is in the inverted position of FIG. 1 for comfort.

Thus it can be seen that the device accomplishes at least all of its stated objectives.

Some changes may be made in the construction and arrangement of my Ankle Device for Supporting an Individual in an Inverted Position without departing from the real spirit and purpose of my invention, and it is my intention to cover by my claims, any modified forms of structure or use of mechanical equivalents which may be reasonably included within their scope.

I claim:

1. In a device of the class described,

an inversion boot adapted for attachment to a person's leg including a first jaw member having opposite ends and a second jaw member having opposite ends,

said first jaw member hingedly secured at one of its ends to one end of said second jaw member,

means detachably securing said other end of said first jaw member to said other end of said second jaw member.

and a hook means secured to one of said first and second jaw members.

2. The device of claim 1 wherein said first jaw member is curved across its width and has a curvature complementary to the posterior side of an individual's lower leg.

3. The device of claim 2 wherein said second jaw member is curved across its width and has a curvature complementary to the anterior side of an individual's lower leg.

4. The device of claim 2 wherein said first jaw member has a curved upper end complementary to the lower calf of an individual's leg.

5. The device of claim 3 wherein said second jaw member includes a lower end having a cut-away portion formed therein adapted to partially receive a portion of an individual's ankle.

6. The device of claim 3 wherein said second jaw member includes a front portion and wherein said hook means includes an inverted substantially U-shaped member secured to the front portion of said second jaw member.

7. The device of claim 1 wherein said first and second jaw members each include exterior and interior surfaces and wherein a padding means is secured to the interior surfaces of said first and second jaw members.

8. The device of claim 3 wherein said first and second jaw members each include exterior and interior surfaces, and upper and lower ends and wherein a padding means is secured to the interior surfaces of said first and second jaw members, said padding means on said first jaw member having a length greater than the length of said first jaw member and also having a width greater than the width of said first jaw member; said padding means on said second jaw member having a length greater than the length of said second jaw member.

9. The device of claim 1 wherein said hook means is adapted to be detachably secured to a horizontal bar means when the inversion boot is in an inverted position.

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739,111	10/1955	Great Britain.

LAWRENCE W. TRAPP, *Primary Examiner.*

Dec. 4, 1928. 1,693,810

M. DANIELS ET AL

NEUROPATHIC HEALTH TABLE

Filed Dec. 20, 1928 2 Sheets-Sheet 1

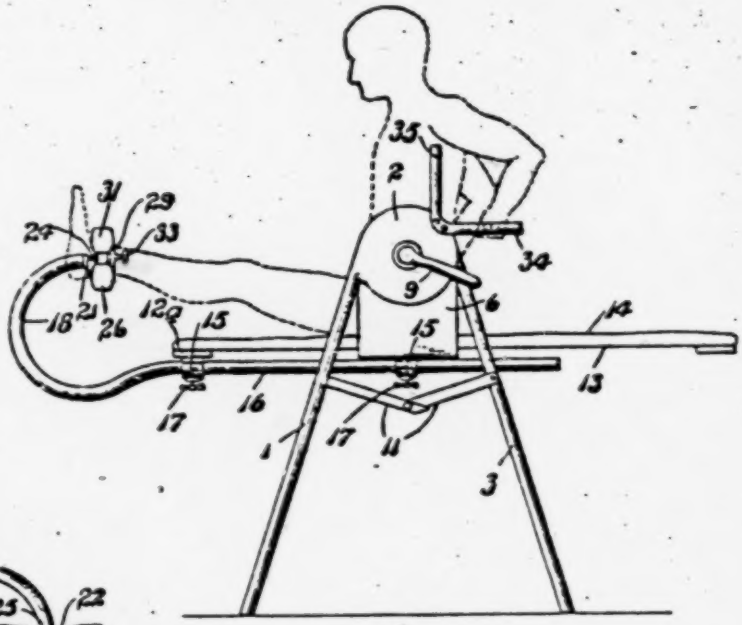

Fig. 1.

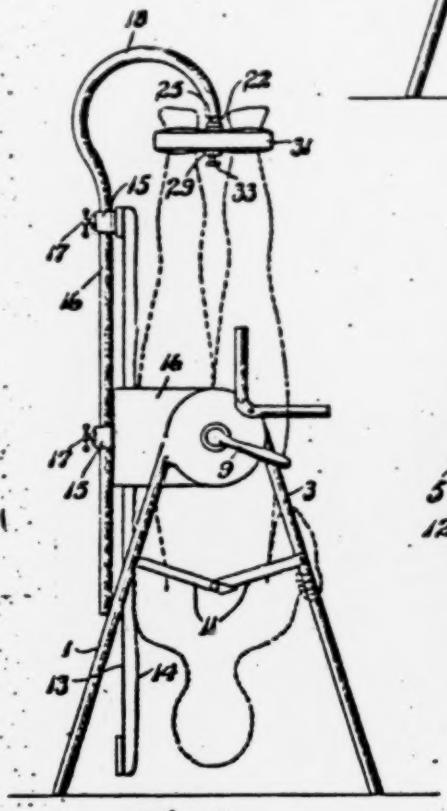

Fig. 2.

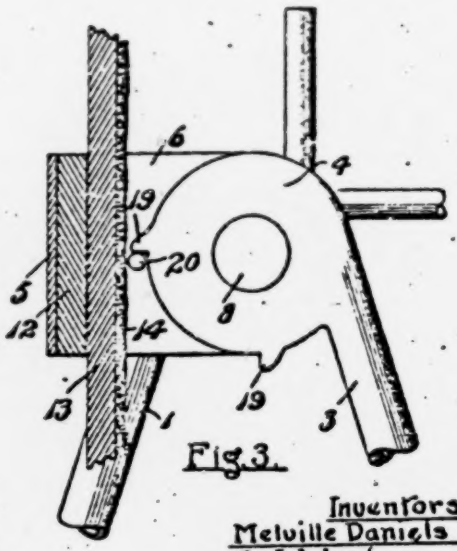

Fig. 3.

Inventors
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A. J. Wood
By Frank E. Livermore, Jr.
Attorney.

Dec. 4, 1928. 1,693,810

M. DANIELS ET AL

NEUROPATHIC HEALTH TABLE

Filed Dec. 20, 1928 2 Sheets-Sheet 2

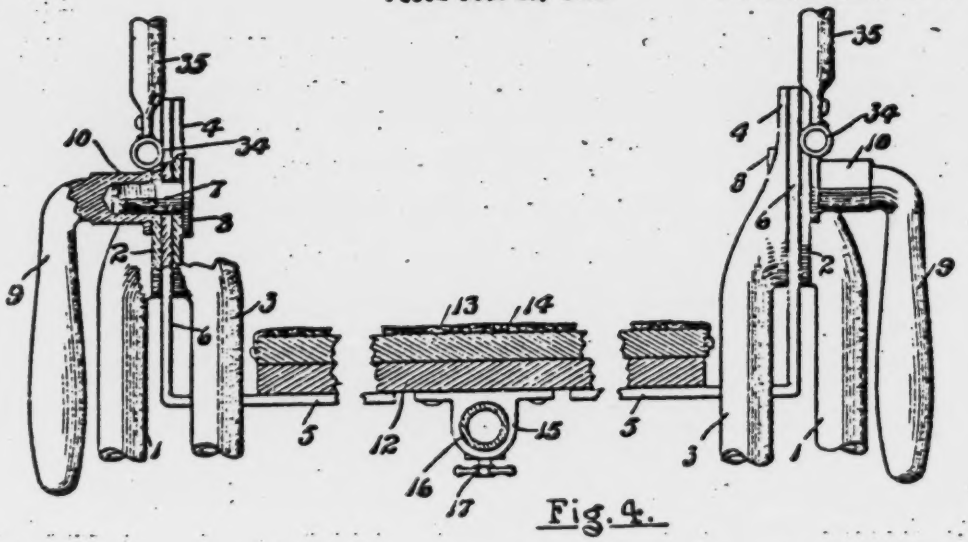


Fig. 4.

Fig. 5.

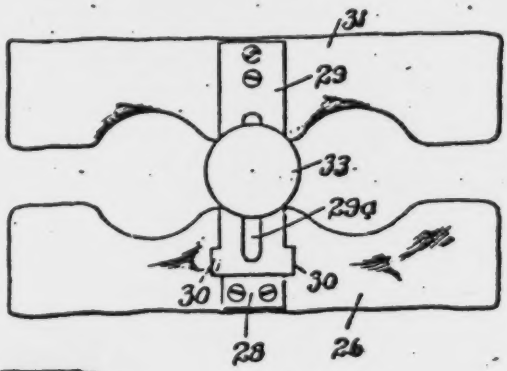


Fig. 6.

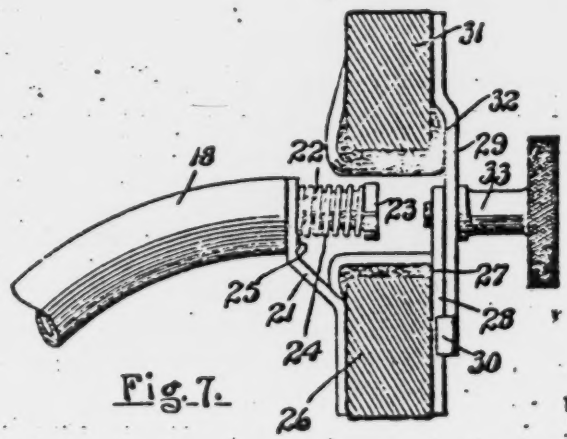


Fig. 7.

Inventors
Melville Daniels
A. J. Wood
By Frank E. Linnemann Jr.
Attorney.

Patented Dec. 4, 1923. 1,693,810

UNITED STATES PATENT OFFICE.

MELVILLE DANIELS AND A. J. WOOD, OF GRAND RAPIDS, MICHIGAN, ASSIGNORS TO DANIELS HEALTH TABLE COMPANY, OF GRAND RAPIDS, MICHIGAN, A CORPORATION OF MICHIGAN.

NEUROPATHIC HEALTH TABLE.

Application filed December 20, 1926. Serial No. 158,022.

This invention relates to a table adapted to be used in the treatment of neuropathic ailments wherein the patient lying on the table may manipulate it so as to change the position and in this manner dispose his (or her) body so that the force of gravity may aid in restoring misplaced organs to proper position and relieve pressure of such misplaced organs which pressure may produce a neuropathic condition. We have found that by use of a table of this kind the patient may give self treatment and cure or palliate many disorders to which the body is subject.

It is a primary object and purpose of the present invention to provide a table of the character outlined on which the patient may lie and which is adjustable on the part of the patient to different angular positions and on which the patient may turn to different positions and still be held against accident. Various novel constructions are supplied for the attainments of these ends as well as others not at this time specifically stated but which will appear from the following description and the accompanying drawings, in which,

Fig. 1 is a side elevation of the table of our invention.

Fig. 2 is a similar elevation, the table having been tilted from a horizontal to a vertical position.

Fig. 3 is a fragmentary enlarged vertical section through the table, illustrating the manner in which it is mounted for movement about a horizontal axis and further illustrating the limit stops used in connection therewith.

Fig. 4 is a transverse vertical section through the table construction the plane of section being substantially through the pivotal mounting therefor.

Fig. 5 is a fragmentary section showing the mechanisms used for rotatably mounting the ankles holding clamp.

Fig. 6 is an elevation of said clamp, and

Fig. 7 is a vertical transverse section therethrough.

Like reference characters refer to like parts in the different figures of the drawings.

In the construction of the device, supporting standards 1 inclined somewhat to the vertical are used at their upper ends being equipped each with an enlarged circular disk-like head 2. Associated with each of the standards 1 is a similar standard 3 which is likewise equipped at its upper end with a disk-like head 4. The standards 1 and 3 preferably are of tubular stock, though not necessarily so, and the heads 2 and 4 thereof are adapted to be connected together. Two pairs of standards are used one at each side of the table and are spaced apart somewhat farther than the width of the table. The table is attached to brackets of metal, each including a horizontal section 5 and a vertical section 6. The horizontal sections 5 extend toward each other and the vertical sections 6 pass between the heads 2 and 4 at the upper ends of the standards 1 and 3 as best shown in Fig. 4. A screw 7 having a head 8 passes through the heads 2 and 4 and the vertical sections 6, the heads 8 of the screws bearing against the heads 4 at the upper ends of standards 3, and the screw being connected to a handle 9 from which a socket portion 10 is turned at right angles, it being interiorly bored and threaded to receive the end of a screw 7. This is fully shown in Fig. 4 and it is evident that by turning the handle 9 the parts, including the heads at the upper ends of the standards and the vertical sections 6 of the table supporting brackets may be securely clamped together; and that on releasing the clamps thus provided the table which is supported on the inwardly extending sections 5 of the supporting brackets may be turned to different positions about the horizontal axis of the screws 7 which serve as pivots about which the table may turn. The supporting standards 1 and 3 at each side of the construction are limited in the extent that they may separate by links such as 11 in Fig. 1.

The table is spaced a short distance above the horizontal sections 5 by means of a cross bar 12 which is secured to said sections. The table 13 lies above and is fixed to said bar 12 and at its upper side and edges is covered with any suitable padding, indicated at 14.

On the under side of the bar 12 and also on the under side of a second bar 12^a secured to the under side of the table near one end thereof, are sleeves 15 mounted in alignment with each other through which a tubular rod 16

may pass, it being adjustable in said sleeves and held in any position to which adjusted by set screws such as indicated at 17. Beyond the end of the table 13 the tube is curved upwardly and thence back toward said table, as best shown in Figs. 1 and 2, making a curved section 18, as shown.

The table with the attached tubular rod 16 is limited in its movements to an arc of substantially 90 degrees. On the heads 4 at the upper ends of standards 3 two stationary stops 19 are provided (see Fig. 3) which are located 90 degrees apart and between which stop pins 20 on the vertical sections 5 of the table supporting brackets may move. This limits the table to a swinging movement between the horizontal position shown in Fig. 1 and the vertical position shown in Figs. 2 and 3.

At the end of the curved section 18 of the tubular rod 16 a bracket 21 of metal is located. It is bent downwardly and inwardly at an incline a short distance below where it is attached to the tube 18 (see Fig. 7) and then extends vertically downward. The upper end of the bracket has an opening through which a pin 22 freely passes, the pin being permanently secured to the end of the tube 18 and at its free end provided with a head 23. A coiled spring 24 under compression is located around the pin 22 between its head 23 and the bracket 21, the normal effect of which is to force the bracket against the end of the curved tubular section 18, as shown in Fig. 7. A short locating pin 25 projects from the end of the tube 18 and passes through an opening in the bracket 21 when the table and the tubular rod 16 are in horizontal position.

A clamping bar 26 is rigidly secured to the downwardly extending outer end of bracket 21 and at its upper side is covered with suitable padding indicated at 27. On the inner side of the clamping member 26, a bar 28 is permanently secured the same extending above the upper side of the bar 26. A second bar 29 having a vertical slot 29ª therein is adjustably mounted on the bar 28, its lower end at each side edge being equipped with lips 30 which pass alongside each edge of the bar 28. A second clamping bar 31 covered with suitable padding 32 is permanently secured to the upper end of the adjustable bar 29. In order to fix the two clamping bars 26 and 31 securely with respect to each other a clamping screw 33 having an enlarged head passes through the slot 29ª and into a threaded opening in the bar 28 and has a shoulder which clamps against the bar 29. It is evident that in this manner the bars 26 and 31 may be adjusted back and forth with respect to each other and may be held in any position to which adjusted. When the patient lies on the table the ankle portions of the legs may be placed in suitable recesses in the upper side of the bar 26 then the bar 31 lowered snugly into engaging position with the legs of the patient and the clamping screw 33 then tightened.

At each side end near the upper edge portion of the heads 2 of the supporting standards 1 of the device, hand holds are permanently secured and lie at right angles to each other as indicated at 34 and 35. In practice these are made from a length of tube flattened between its ends where the attachment is made to heads 2 and bent at right angles at the flattened portion so as to make the vertical hand holds 35 and the horizontal hand holds 34.

The patient having been placed on the table or having placed himself (or herself) thereon and clamped the legs within the ankle clamp may then loosen the handles 9 and turn the table to different positions, anywhere between the horizontal position shown in Fig. 1, and the vertical position shown in Fig. 2. By reason of the structure and the limit stops which are provided the swing of the table can only be so as to lower the head of the patient and at any point between the horizontal and vertical position of the table this movement may be stopped. By reason of the weight of the patient which is carried wholly or partly by the ankle clamping bars, spring 24 is compressed, the bracket 21 is disengaged from the pin 25 and the leg or ankle clamps may be turned about the axis of the pin 22. This permits the patient to turn to different positions on the table. There are many positions in which certain misplacement of organs will be rectified and nerves relieved from pressure and the patient may turn to the desired position and secure such relief with an eventual replacement of the organ to natural position. With this apparatus various attachments may be used on the table for supporting the head or other portions of the body but these are not shown or described in the present application.

The table is very practical and serviceable and has proved particularly valuable in treatment of neuropathic disorders. It is simple to operate, adjustable for different heights of persons using it and can be used in the home without the necessity of an attending physician or nurse. The invention is defined in the appended claims and is to be considered comprehensive of all forms of structure coming within their scope.

With reference to the ankle clamping device which has been definitely disclosed and described as such, it is pointed out that any equivalent device adapted to clamp the feet or in fact any part of the lower extremities of a person may be substituted as a mechanical and actual equivalent. Wherever the device is referred to as an ankle clamping means such designation is to be understood in this broader sense.

We claim:

1. In a construction of the class described, spaced apart vertical supports, brackets pivotally mounted one at the upper end of each support to turn about a horizontal axis, each of said brackets including a horizontal section, said horizontal sections of the brackets extending toward each other, a table carried by and between said horizontal sections of the brackets, a member located below, lengthwise of and adjustable longitudinally with respect to the table, said member at one end extending beyond the adjacent end of the table and thence bent upwardly and back toward the table and a legs holding clamp mounted at the outer end of the said member.

2. In a construction of the class described, spaced apart vertical supports, a table disposed between said supports and located a distance below the upper ends thereof, means for mounting said table for turning movement on the supports about a horizontal axis located above the table, a rod disposed below and lengthwise of the table, means for adjustably mounting said rod on the table, one end of the rod extending beyond the adjacent end of the table and thence being bent upwardly and back, and a legs holding clamp connected to the outer end of said rod substantially as described.

3. In a construction of the class described, spaced apart vertical supports, a table located between said supports and mounted thereon for turning movement about a horizontal axis, means for limiting the movement of said table between two positions in one of which the table is horizontal and the other vertical, a member located lengthwise of and below the table, means for mounting said member on the table whereby it may be longitudinally adjusted with respect to the table, said member at one end extending beyond the adjacent end of the table and being thence bent upwardly and back toward the table, and a legs holding clamp pivotally mounted on the outer end of said member so that it may be turned to any desired position.

4. A construction containing the elements in combination defined in claim 3, combined with means for normally holding said legs holding clamp against turning movement with respect to the member on which it is mounted.

5. In a construction of the class described, spaced apart vertical supports, a table located between said supports, means for mounting the table on said supports for turning movement about a horizontal axis, a rod located below and adjustably mounted on the table for longitudinal adjustment, one end of the rod extending beyond the adjacent end of the table thence bent upwardly and back toward the end of the table, a headed pin attached to and projecting from said end of the rod, a bracket rotatably mounted on and depending from said pin, a coiled spring around the pin between said bracket and the head of the pin, a second smaller pin projecting from the end of the rod and adapted to pass through an opening in said bracket and a legs holding clamp carried by said bracket.

6. In a construction of the class described, spaced apart vertical supports having heads at their upper ends, supporting brackets each including a vertical section and a horizontal section pivotally mounted to turn on a horizontal axis, one of said brackets being pivotally connected to each of said supports at their upper ends whereby the vertical sections of the brackets extend downwardly from the pivots and the horizontal sections of the brackets extend toward each other, stop lugs located substantially 90 degrees apart projecting from a head of the support, a complementary stop pin extending inwardly from the vertical section of a bracket between said stop lugs, a table attached to, carried by and extending between the horizontal sections of said brackets, and a legs holding clamp connected with said table adjacent one end thereof substantially as described.

7. In a construction of the class described, spaced apart vertical supports each comprising two tubular standards converging adjacent their upper ends and each formed with circular heads, a bracket of flat metal having a vertical section located between the heads of each pair of standards, a headed and screw threaded pivot screw passing through said heads and vertical section of the bracket, a handle formed at one end with a socket located at right angles to the handle, said socket being screwed on to the threaded end of its pivot screw, whereby said heads and brackets may be clamped together or released sufficient to permit turning movement of the brackets, a table located between and connected to said brackets and means carried by the table for clamping the legs of a patient lying upon said table.

8. A construction containing the elements in combination defined in claim 7, combined with hand holds secured at the upper ends of each vertical support, each of said hand holds including a horizontal rearwardly extending member and a vertical member located at right angles to the horizontal member.

9. In a construction of the class described, a table mounted to turn about a horizontal axis from horizontal to vertical position, means associated with the table and moving therewith for clamping the ankles of a person, said means being freely rotatable relative to the table.

10. In a construction of the class described, a table mounted for movement about a horizontal axis, means associated with the table and freely rotatable relative thereto for

clamping the ankles of a person, and releasable means for holding said ankle clamping means non-rotative.

11. In a construction of the class described, a table mounted for movement about a horizontal axis, means associated with the table and rotatable relative thereto for clamping the ankles of a person, and releasable means for holding said ankle clamping means non-rotative, said releasable means being released by weight suspended from the ankle clamping means.

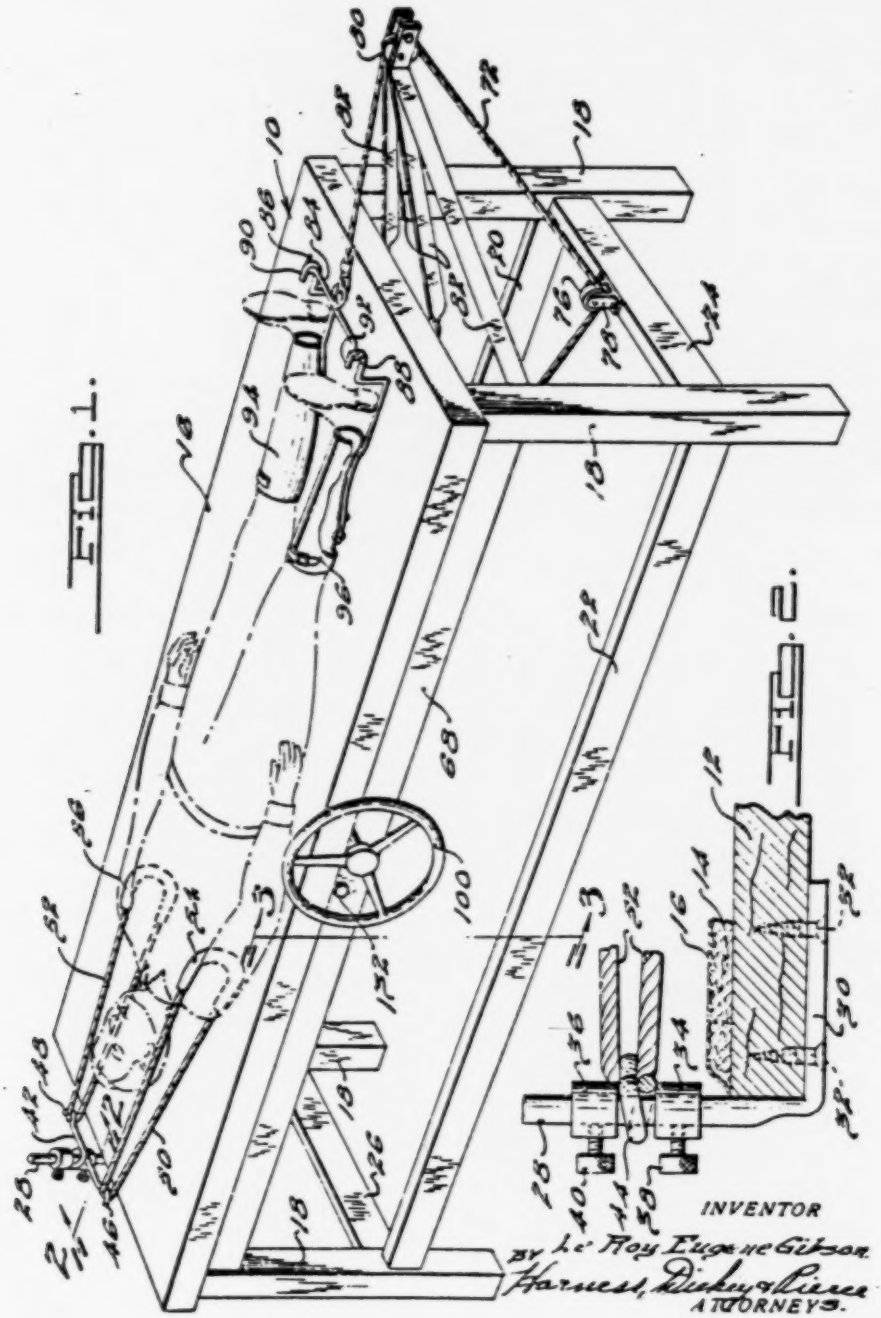
In testimony whereof we affix our signatures.

MELVILLE DANIELS.
A. J. WOOD.

July 30, 1940. LE ROY E. GIBSON 2,209,310

THERAPEUTIC TABLE

Filed Jan. 30, 1939 2 Sheets-Sheet 1



INVENTOR

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ATTORNEYS.

July 30, 1940. LE ROY E. GIBSON 2,209,310

THERAPEUTIC TABLE

Filed Jan. 30, 1939 2 Sheets-Sheet 2

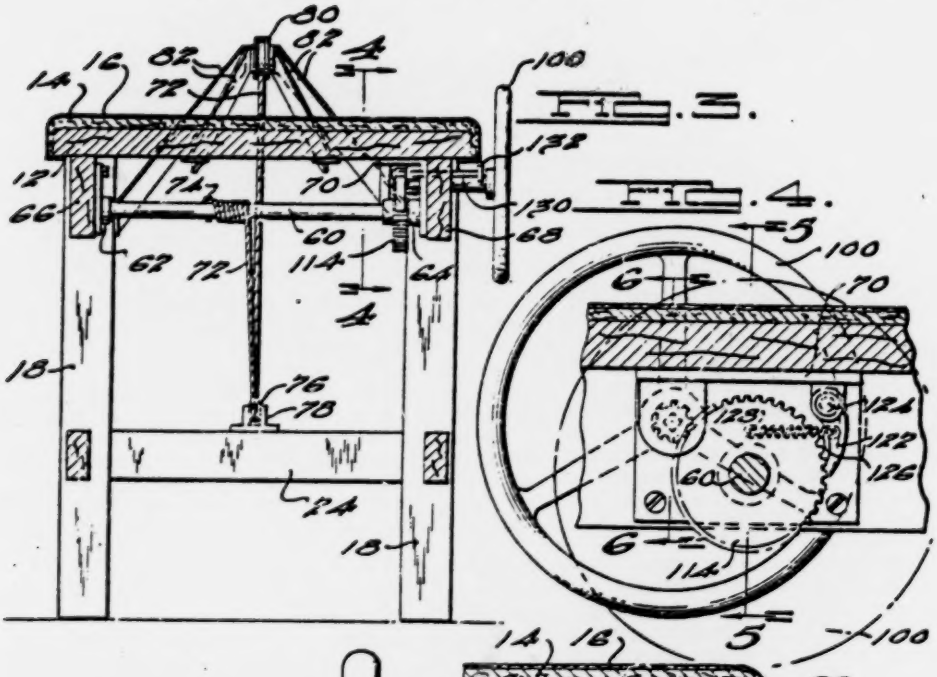

FIG. 3.

FIG. 4.

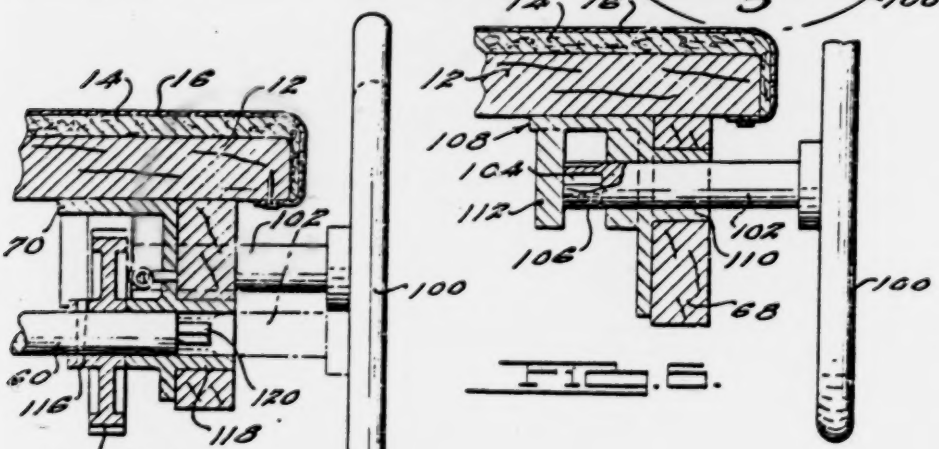

FIG. 6.

FIG. 5.

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UNITED STATES PATENT OFFICE

2,209,310

THERAPEUTIC TABLE

Le Roy Eugene Gibson, Pontiac, Mich.

Application January 30, 1939, Serial No. 253,533

1 Claim. (Cl. 128—71)

This invention relates to therapeutic tables.

The main objects of this invention are to provide an improved therapeutic table for stretching a patient; to provide a treatment table on which a patient may lie down, relax, and while in such relaxed position have the body stretched, particularly the spine; to provide a therapeutic table which is simple in construction and which may be readily manipulated by the operator; and which is at all times under the control of the operator or of the patient himself while in a reclined position.

An illustrative embodiment of this invention is shown in the accompanying drawings, in which:

Fig. 1 is a view in perspective of the improved therapeutic table showing a patient in position thereon receiving a treatment.

Fig. 2 is an enlarged fragmentary sectional view taken on the line 2—2 of Fig. 1, looking in the direction indicated by the arrows.

Fig. 3 is a sectional view taken along the line 3—3 of Fig. 1, looking in the direction indicated by the arrows.

Fig. 4 is an enlarged, fragmentary view, partly in section and partly in elevation, taken along the line 4—4 of Fig. 3.

Fig. 5 is a sectional view taken along the line 5—5 of Fig. 4, looking in the direction indicated by the arrows, and

Fig. 6 is a sectional view taken along the line 6—6 of Fig. 4, looking in the direction indicated by the arrows.

As a result of many years of experience and substantiated by case records of many hundreds of patients, it is evident that disorders of the internal organs are in nearly every instance caused from pressure on the nerves which branch out between the various vertebrae of the spinal column. As substantiated by case records, such disorders may be quickly, and in some instances practically instantaneously, cured by stretching the vertebrae of the spine so as to relieve the pressure on the communicating nerves.

In the construction shown in the drawings, the table comprises a rectangular, horizontally disposed, table top member generally designated 10 which may be formed of a relatively heavy and substantial board 12 having a pad 14 thereon covered by canvas 16, or other suitable cloth.

The top 10 is supported adjacent its four corners by vertically disposed legs 18 which are connected by horizontally disposed side braces 20 and 22, and similarly disposed end braces 24 and 26, all of which are in spaced relation to the lower end of the legs so as to lend strength and rigidity to the table structure.

One end of the table top, at the medial point thereof, is provided with a vertically disposed metal post 28, the lower end of which is turned at right angles, as shown at 30, to fit underneath the board 12 to which it is rigidly secured by screws 32. The post 28 is provided with a pair of slidable set collars 34 and 36 which may be adjustably positioned on the post by means of knurled set screws 38 and 40, respectively.

The collars 34 and 36 adjustably position and retain a horizontally disposed equalizing bar 42, the middle part of which is provided with an eye or ring 44, formed by bending the bar in the form of a closed loop or circle with the free ends extending in opposite directions in substantial alignment with each other. The outer ends of the equalizing bar 42 are bent to provide hooks 46 and 48 which are adapted to receive closed loops of rope or cord 50 and 52, respectively. The loops 50 and 52 are preferably provided with padded portions 54 and 56, respectively, which may be placed underneath the arms of a patient lying on the table top, as shown in Fig. 1 of the drawings. The loops 50 and 52 are detachably attached to the equalizing bar 42 which in turn is rigidly held by the post 28 and thus provides a firm and secure anchor for the upper part of the patient's body.

Means are provided for exerting a positive pull on the patient's lower extremities and comprise a geared mechanism having a main shaft 60 horizontally disposed transversely of the table in spaced relation under the top thereof with the opposite ends of the shaft journaled in sockets 62 and 64 which are secured to the inner sides of longitudinally extending, edgewise disposed, wood brace members 66 and 68, respectively. The socket 64 is integrally formed as part of an angle bracket having a vertically disposed portion attached to the brace 68 and a horizontally disposed leg 70 which is attached to the underside of the table top board 12.

The shaft 60 is adapted to have one end of a cable 72, preferably of stranded wire, anchored thereto, as shown at 74, the free end of which passes around a guide pulley 76 journaled in a bracket 78 which is attached to the upper edge of the end brace 24. From the guide pulley 76, the cable 72 extends upwardly and outwardly to pass around a guide pulley 80 which is journaled between the outer converging ends of a plurality of brace members 82 which are attached to that end of the table, two of the brace members being

attached to the undersides of the table top and the other two to the adjacent legs. The brace members 82 extend outwardly and upwardly so that the guide pulley 88 is vertically spaced above the horizontal plane of the table top, as shown most clearly in Fig. 3 of the drawings.

From the guide pulley 88, the cable 72 extend horizontally toward the table top and is attached to an equalizing bar 84 which is of the same general construction as the equalizing bar 42. Hooked ends 86 and 88 of the equalizing bar 84 are adapted to engage hooked ends 90 and 92 of metal braces which are riveted or otherwise suitably secured to leg straps or clamps 94 and 96, respectively, which are adapted to be strapped or otherwise suitably secured to the calves of the patient's legs.

Means are provided for rotating the shaft 68 in both fast and slow motion, and comprises a hand wheel 100 having a shaft 102 rigidly keyed thereto at one end thereof, the other end of said shaft having an axially extending squared socket 104 formed therein, and having gear teeth 106 exteriorly formed thereon. The bracket in which the socket 64 and horizontal flange 70 are integrally formed is generally designated 108 in Fig. 6 of the drawings, and as shown therein is provided with a sleeve portion 110 adapted to pass through an opening formed in the side brace 68 and having a bore therethrough of a size to serve as a journal bearing for the shaft 102. A depending flange 112 is formed on the horizontally extending flange 70 in position to have the inner end of the shaft 102 abut thereagainst and thereby hold the gear teeth 106 in correct position to mesh with a gear wheel 114 non-rotatably secured to the shaft 68 by a pin 116 which extends through an axially extending sleeve of the gear 114 and passes diametrically through the shaft 68.

The gear wheel 114 serves as a set collar to hold the opposite end of the shaft 68 in its socket 62, and the bracket 108 is also provided with a horizontally extending sleeve portion 118 which serves as a journal bearing for the shaft 68 which extends substantially halfway therethrough. This end of the shaft 68 terminates in a square axially extending lug 120 which is adapted to have easy sliding fit in the socket 104 which is formed in the end of the shaft 102. The bore through the sleeve 118 is of uniform diameter and the shafts 102 and 68 are of substantially the same outside diameter so that the end of the shaft 102 having the socket 104 therein may be readily slipped into the bore of the sleeve 118 and fit over the squared end of the shaft 68, as shown in dotted outline in Fig. 5.

Means are provided for preventing rotation of the shaft 68 in one direction while permitting rotation thereof in the opposite direction and comprise a pawl 122 journaled at 124 on a depending lug integrally formed on the flange 70 in position so that the free end of the pawl rides on the face of the gear teeth of gear 114. A helical tension spring 126 has one end secured to the pawl 122 and its other end anchored to a hroizontally extending pin 128 mounted in the vertical flange of bracket 108.

The pawl 122 is rigidly mounted on a horizontally disposed shaft 130 which extends through and is journaled in the bracket 108 and protrudes beyond the outer side of the side brace 68 where it is provided with a handle 132 by which it may be swung away from the gear teeth against the action of the spring 126.

In the operation of this device the patient is placed upon the table in a comfortable position and the arm loops adjusted underneath the arm pits with the ends of the loops secured over the hooked ends 46 and 48 of equalizing bar 42. The height of the equalizing bar 42 is adjusted on its supporting bar 48 by means of the set collars 34 and 36 so as to be in substantially the same horizontal plane as the patient's arms so as to exert a straight pull thereon. The leg clamps 94 and 96 are secured to the calves of the patient's legs and equalizing bar 84, which is attached to the cable 72, is then hooked to the ends 90 and 92 of the leg clamps.

The hand wheel 100 with its shaft 102 is then placed in the position shown in dotted lines in Fig. 5 of the drawings with the socket 104, formed in the end of the shaft 102, fitting over the squared end 120 of the shaft 68. The hand wheel is then rotated to take up all slack in the cable 72 and place an initial tension on all of the parts as well as the patient's body.

The hand wheel and attached shaft is then removed and slipped into the bearing formed in sleeve 110 with the teeth 106 on the inner end of the shaft 102 in mesh with the teeth of gear 114. The hand wheel 100 is again rotated in the appropriate direction to wind up the cable 72 on the shaft 68, and this is continued until the patient's body and particularly the vertebra thereof is stretched to a sufficient point.

By having the hand wheel and main shaft 68 located medially of the table, it is both possible and convenient for a patient lying upon the table to manipulate the hand wheel himself, and thereby gauge the amount of stretching to which his body is subjected. The pawl 122 being normally spring pressed to ride upon the teeth of the gear 114 gives an audible indication of very small increments of stretch, and thereby serves as a guide to the operator or to a patient who is operating the hand wheel himself. Stretching of this character will not only separate the vertebrae from each other to relieve tension, but at the same time will align the vertebrae so that sidewise pressure on the spinal cord is relieved.

Although but one embodiment of the invention has been herein shown and described, it will be understood that further details of the construction shown may be altered or omitted without departing from the spirit of the invention, as defined by the following claim.

What is claimed is:

In a therapeutic table for stretching a patient and having means for clamping one extremity of the patient to the table, a cable having one end adapted to be detachably attached to the other extremity of the patient, the other end of said cable being anchored to a shaft, journals for said shaft on said table, a gear non-rotatably mounted on said shaft, a journal bearing bracket for one end of said shaft, said shaft gear being adjacent thereto and abutting against said journal bearing bracket, such end of such shaft terminating in an axially extending coupling, a hand wheel, a shaft rigid to said hand wheel at one end thereof, the other end of said hand wheel shaft having a complementary coupling for attachment to the end of said cable winding shaft, and pinion teeth formed on said hand wheel shaft adapted to mesh with said cable winding shaft gear, and a journal bearing formed in said bracket for receiving said hand wheel shaft and for holding said pinion teeth in mesh with said shaft gear.

LE ROY EUGENE GIBSON.

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-692 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

ROGER TEETER AND JENNIFER TEETER
D/B/A SKY'S THE LIMIT,
PETITIONER.

VS.

GRAVITY GUIDANCE, INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

I. INTRODUCTION

Respondent, Gravity Guidance, Inc.[1], respectfully submits that the Petition for Certiorari should be denied on at least three grounds. First, Petitioners Roger Teeter and Jennifer Teeter d/b/a Sky's the Limit (hereinafter referred to as "Teeters") have inaccurately portrayed the District Court judgment against them and the affirmance of

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[1]Respondent Gravity Guidance, Inc. has transferred all rights of recovery for infringement of the patent-in-suit to the California corporation P/MD Corp. d/b/a American Orthopedic Rehab.

that judgment on appeal. Secondly, the alleged issues presented for review do not even approach the special and important reasons which this Court considers in deciding whether review should be taken. Third, the Teeters are simply trying to relitigate what has already been litigated and lost at the Trial Court level, and then affirmed on review by the U.S. Court of Appeals for the Federal Circuit.

II. PETITIONER'S QUESTIONS PRESENTED FOR REVIEW IN THE PETITION FOR CERTIORARI DO NOT ACCURATELY PORTRAY WHAT OCCURRED AT THE TRIAL LEVEL OR THE APPELLATE LEVEL.

The predicate bases for the Teeters' Petition for Certiorari requesting jurisdiction and review by this Court are allegations of errors

by the lower courts. The Teeters' "Questions Presented for Review" allege the lower courts disregarded issues based on patent statute 35 USC §103, disregarded the claims of the patent being sued upon, and neglected consideration of alleged prior art to the patent in finding and affirming the judgment of infringement, and willful infringement, against the Teeters.

The Teeters' jurisdictional statement claiming to support the "Questions Presented For Review" is filled with conclusory and self-serving statements not based on the record, but rather on their interpretations and conclusions of what the results should have been. Moreover, Teeters mischaracterize the

nature of the proceedings below both at the District Court level and the Appellate Court level.

This was a patent infringement action. The Teeters were at the end of a long line of infringers (all of which have unsuccessfully litigated this patent) who had entered the market for the product only when it became commercially successful. The Teeters' own discovery answers admitted that they knew about the patent well prior to entering the market with their infringing product, but chose to do so anyway. Both the Trial Court and the Court of Appeals found the Teeters' were without any reasonable basis to do so.

In spite of the fact judgments had been entered against five prior

infringers, the Teeters willfully and wantonly continued making and selling their infringing product. Utilizing the Teeters' own discovery answers and documentary evidence, Respondent Gravity Guidance, Inc. (hereinafter Gravity Guidance) filed a motion for summary judgment asking that the Trial Court find infringement, and that such infringement was willful. Gravity Guidance submitted a statement of undisputed facts which was never seriously challenged by the Teeters.

The Trial Court granted summary judgment for infringement and willful infringement, and the U.S. Court of Appeals for the Federal Circuit affirmed the same. The Teeters did not raise at the Trial Court (or on

appeal) any issues regarding these findings and conclusions that they had infringed the patent, and that such infringement was willful.

Instead, at the Trial Court, Teeters' ultimately relied solely on a cross-motion for summary judgment claiming that the patent was invalid. That both the Trial Court and the Court of Appeals rejected that motion is the basis for the present petition to this Court.

Teeters' inaccurately portray the District Court and the Court of Appeals as ignoring fundamental precepts of both the patent law and procedural rules in dealing with their summary judgment motion for

invalidity. In fact, as borne out clearly by the record and the respective judgments of Courts, the Trial Court found, after discovery was taken by the parties, full briefing was filed, evidence was submitted, and full oral argument was presented, that the Teeters did not meet their burden of proof of showing invalidity. It must be understood that the Teeters had the burden of proof to overcome the statutory presumption of validity of a patent (35 U.S.C. 282) by clear and convincing evidence; a very high standard of proof. Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082 (Fed.Cir. 1985).

In kind, the Court of Appeals decision explicitly stated that

". . . the District Court correctly determined that Teeter had failed to carry its burden to establish anticipation, e.g., Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Co., 730 F.2d 1452,1458, 221 U.S.P.Q. 481,485 (Fed.Cir. 1984) . . .". [See Appendix B, p. 5a].

It is therefore respectfully submitted that an accurate portrayal of the history of the case would reveal that (a) the Teeters abandoned any contest of infringement or willfulness of infringement, and (b) by pursuing their defense of invalidity by summary judgment motion, the Teeters' admitted that there were no genuine issues of material facts as to any of the

issues before the Trial Court. After due consideration, Gravity Guidance prevailed at the Trial Court level. Quite simply, the Teeters could not and did not meet their high burden of proof. The Appellate Court simply concurred that the Teeters' failed in carrying that burden.

The issues the Teeters' now present as alleged questions for review are either inaccurately portrayed or were waived in their two chances before the Trial Court and the Court of Appeals.

III. NO COMPELLING REASON FOR GRANTING REVIEW HAS BEEN ALLEGED BY PETITIONERS.

To invoke jurisdiction of the Supreme Court of this land, the very Rules of this Court provide that

"special and important reasons" must form the basis for consideration for such review. This is neither an ambiguous nor a meaningless standard. There must be a clear, direct and readily apparent conflict in the courts, or an issue of compelling public importance for the court to consider review. The importance must be "to the public as distinguished from" the particular "parties" involved. See, e.g., Rice v. Sioux City Cemetery, 349 U.S. 70,79 (1955). Supreme Court Rule 17 sets forth three examples of such compelling reasons.

The Teeters do not specify with clarity what reason they believe merits review by this Court. However, it is clear that any of the

questions presented for review by the Teeters are not of the urgent or compelling nature for which this Court should exercise its supervision.

As discussed above, an accurate portrayal of the case at the Trial level and Appellate level shows that the Teeters' disagree with the results of those Courts, but that they were given full opportunity to make their case. They failed to do so.

The cases cited by the Teeters, with the implication that either the Trial Court or the Court of Appeals did not follow established case law, are again only conclusory, self-serving characterizations, which are based on their flawed and inaccurate portrayal of the proceedings.

Fundamentally, Teeters' Petition for Certiorari is devoid of any special or important reason for the Court to entertain review.

IV. PETITIONERS SEEK ONLY TO RELITIGATE ONLY WHAT HAS ALREADY BEEN LOST.

The Teeters' petition for review by this respected Court is predicated only upon dissatisfaction with the results obtained at the Federal Trial Court level or Federal Appellate level.

The Teeters' simply have lost after a full and fair proceeding at the Trial Court level. They entertained an appeal of that judgment to the U.S. Court of Appeals for the Federal Circuit. The District Court judgment was affirmed in its entirety.

The present petition is simply an effort to grasp at last straws to again relitigate what has already been lost. No compelling miscarriage of justice or shocking departure from accepted or usual course of judicial proceedings has been alleged. There is no preeminent or universally important law which has been decided or have been breached in the Courts below that merits or demands review by this court.

V. CONCLUSION

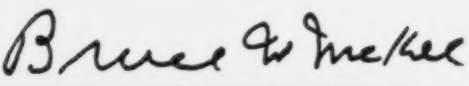
For the foregoing reasons, it is respectfully submitted that Teeters' Petition for Certiorari should be denied in its entirety. Under Supreme Court Rule 49.2, it is submitted that Teeters' petition is

frivilous and the Court is requested to award Respondent, Gravity Guidance, appropriate damages.

Dated this 30th day of November, 1988.

Respectfully submitted,

GRAVITY GUIDANCE, INC.

By 

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NO. 88-692

IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

ROGER TEETER AND JENNIFER TEETER
D/B/A SKY'S THE LIMIT,
PETITIONER.

VS.

GRAVITY GUIDANCE, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL STATEMENT OF THE CASE

The District Court for the Western District of Washington at Tacoma rendered a judgment in this case on December 8, 1988 (APPENDIX I).

The Judgment

The judgment summary (APPENDIX I, p. 1 APP) included treble damages of $2,057,802.00 plus $428,768.00 interest, equaling $2,486,570.00 -- almost 2-1/2 million dollars -- plus attorney's fees.

Significance of the Damages Judgment to this Petition

Finding 5 of the damages Judgment (APPENDIX I, p. 5 APP) referred to the previous Order dated

June 10, 1986 (Petition APPENDIX A)

as:

> . . . holding that defendants infringed the patent-in-suit and that such infringement was willful . . . .

whereas such previous Order stated:

> 2. Defendants did not literally infringe upon Plaintiff's patent rights.
>
> 3. Under the Doctrine of Equivalents, Defendants infringed upon the patent rights of Plaintiff.
>
> 4. The infringement of Defendants was willful.

Thus, the Court recognized that Teeter did not copy the structure of the Gravity Guidance leg holder, but implied that "under the doctrine of equivalents", the differences between Teeter's construction and the construction of Gravity Guidance would be obvious to a person skilled in the art.

The ruling that Teeter's infringement was "willful and deliberate" (Findings 5 and 24) and trebling of the actual damages under 35 U.S.C. § 284 indicates the Court's opinion that Teeter knew such differences of Teeter over Gravity Guidance were obvious equivalents. Nevertheless, both the District Court and the Court of Appeals for the Federal Circuit failed to consider that similar differences between the prior art Gibson patent and the Gravity Guidance leg holder were obvious under 35 U.S.C. § 103.

Such disregard of the prior art in determining the question of infringement on the basis of the doctrine of equivalents is improper. Carman Industries, Inc. v. Wahl et

al., 724 F.2d 932, 220 USPQ 481 (Fed. Cir. 1983) refers to the decision of the District Court judge as follows (emphasis supplied--USPQ page 484, middle column 2):

> He found that the patent is not literally infringed but that the accused infringing device is the legal equivalent of the invention. He also found that, under the proposed construction of the claims under the doctrine of equivalents the claims would be valid . . . .

and further stated (emphasis supplied--USPQ page 489, middle column 1):

> Once it is determined that the doctrine of equivalents is applicable, a finding of infringement is not certain. The doctrine of equivalents is subject to two types of limitation[s] which may prevent a finding of infringement . . . (2) invalidity of the claims according to the proposed construction in view of the prior art. . . .
>
> The court below, in an exhaustive analysis, examined the proposed construction of

> the claims under the doctrine of equivalents to determine whether such construction would invalidate the claims under section 102 or 103.

In the present case, neither the District Court nor the majority of the Court of Appeals panel expounded a "proposed construction of the claims", or considered whether the claims would be invalid under 35 U.S.C. § 103.

Supreme Court Exposition on
The Doctrine of Equivalents

In Graver Tank & Mfg. Co., Inc., et al. v. The Linde Air Products Company, 339 US 605, 85 USPQ 328 (Sup. Ct. 1950), the Supreme Court stated (emphasis supplied--USPQ page 330, middle of column 1):

> In determining whether an accused device or composition infringes a valid patent,

> resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

Neither the District Court nor the Court of Appeals for the Federal Circuit made any reference to the "words of the claim". The Court continued:

> But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for--indeed encourage--the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law.

The Court then explained how the "doctrine of equivalents" was to be

applied (emphasis supplied--USPQ 330, bottom of column 2):

> What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case.

In the present case, neither the District Court nor the Court of Appeals determined the issue of "equivalency" with respect to the prior art under 35 U.S.C. § 103.

Stating the matter in another way, as a person skilled in the art Teeter was expected to know that the differences between his construction and that of Gravity Guidance were "obvious", but both the District Court and the Court of Appeals completely disregarded the other side of the coin as to the obviousness of the differences between the Gibson prior

art patent (Petition APPENDIX H), which is very similar to the Teeter leg holder construction, and Gravity Guidance under 35 U.S.C.§ 103.

Procedure Recommended
By Supreme Court
Not Followed by Court of
Appeals for the Federal Circuit

Thomas & Betts Corporation v. Litton Systems, Inc., 720 F.2d 1572, 220 USPQ 1 (Fed. Cir. 1983), recognized and paid tribute to the above-quoted Graver Tank pronouncement (USPQ page 6, middle of column 1) and then continued (emphasis partially supplied):

> In other words, the test of equivalency extends beyond what is literally stated in a patentee's specification to be equivalent and encompasses any element which one of ordinary skill in the art would perceive as interchangeable with the claimed element.

The same "obviousness" test should be used both in applying the doctrine of equivalents and in applying 35 U.S.C. § 103 as to prior art.

Here both courts applied the "doctrine of equivalents" in determining infringement, but neglected to apply the "obviousness" test under section 35 U.S.C. § 103 to the question of validity.

Test Summarized by the Supreme Court

That the same test should be applied on the question of validity as on the question of infringement was stated succinctly by the United States Supreme Court many years ago in Knapp v. Morss, 150 US 221 (Sup. Ct. 1893) at page 228 (emphasis supplied):

> There is another test as to the validity of the second

> claim. If the Balch, Everett, Wilson, or Ferris patents, or even the umbrella, were subsequent in date to that of the Hall patent, they would constitute an infringement thereof, for the rule is well established that "that which infringes, if later, would anticipate if earlier."

Paraphrasing the rule:

> That which infringes under the doctrine of equivalents, if later, would invalidate the patent for obviousness under 35 U.S.C. § 103 if earlier.

If the District Court and the Court of Appeals had applied the test of "obviousness" to the differences between the prior art Gibson patent and the Gravity Guidance device as the District Court presumably did with respect to the differences between the Teeter device and the Gravity Guidance device in holding that the damages awarded to Gravity Guidance should be trebled, undoubtedly the Gravity

Guidance patent would have been held to be invalid because the Teeter leg holder is very similar to the prior art leg holder of the Gibson patent.

Miscarriage of Justice

To allow the District Court and the Court of Appeals to hold that Teeter has infringed the patent rights of Gravity Guidance on the basis of the doctrine of equivalents and not to apply the "obviousness" test of 35 U.S.C. § 103 and the decisions of the Supreme Court as to the prior art constitutes a miscarriage of justice.

Such miscarriage of justice is compounded by the ruling of the District Court's damages Judgment that Teeter's utilization of prior art equivalents constituted obvious

willful and deliberate infringement to such an extent as to inflict on Teeter the punishment of trebled damages.

Teeter's only recourse for a remedy of such lopsided administration of "justice" is to this Court.

DATED this 27th day of December, 1988.

Respectfully submitted,

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ENTERED ON
DEC 8, 1988
By Deputy /s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUDGMENT IN A CIVIL CASE

GRAVITY GUIDANCE, INC.	)	
	)	
v.	)	Case
	)	Number:
ROGER TEETER and	)	C83-824T
JENNIFER TEETER, d/b/a	)	
SKY'S THE LIMIT	)	
	)	

XX Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff is entitled to actual damages, when trebled, in the amount of $2,057,802.00. Plaintiff is entitled to prejudgment interest on any damage award from the date of first infringement. Total prejudgment interest is $428,768.00. Attorney's

fees and costs shall be granted to plaintiff.

Date 12/8/88 Clerk Bruce Rifkin

By Deputy Clerk /s/

ENTERED ON
DEC 8, 1988
By Deputy /s/

IN THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON
AT TACOMA

GRAVITY GUIDANCE, INC.,	)	
	)	
Plaintiff,	)	No.
	)	C83-824T
vs.	)	
	)	
ROGER TEETER and	)	
JENNIFER TEETER, d/b/a	)	
SKY'S THE LIMIT,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

THIS MATTER having come on before the above-entitled Court, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter and the

parties herein, by reason of Title 28 U.S.C. §1331 and §1338. Venue is proper under U.S.C. §1400.

2. This action was originally filed December 2, 1983, in three Counts; Count I for patent infringement of the patent-in-suit; U.S. Letters Patent 3,380,447; and Counts II and III for violations of 15 U.S.C. §1125(a) and common law trademark infringement. Defendants answered denying the complaint and asking for a declaratory judgment of non-infringement under the three counts of the complaint.

3. Plaintiff filed a motion for summary judgment on Count I for patent infringement and willful and deliberate patent infringement.

4. Defendants filed a motion for summary judgment for invalidity of the patent-in-suit.

5. By order of June 10, 1986, this Court granted Plaintiff's Motion for Summary Judgment, holding that defendants infringed the patent-in-suit and that such infringement was willful; denying Defendant's Motion for Summary Judgment; and holding that the patent-in-suit was valid as against all defenses presented by the defendants.

6. Counts II and III, and the portion of the counterclaim pertaining to the defendants' unlawful use of the plaintiff's trademark "Gravity Boots", were ordered voluntarily dismissed.

7. By order dated October 27, 1987, the Court found that the case

was final except for an accounting for damages, and that under 28 U.S.C. §1292(c)(2), the judgment of infringement, willful infringement, and validity was a final judgment and appealable.

8. Defendants did appeal the final judgment of liability and the determination of the amount of damages was ordered stayed until conclusion of the appeal.

9. By judgment and mandate dated August 4, 1988, the United States Court of Appeals for the Federal Circuit affirmed this Court's finding of infringement, willfulness of infringement and validity.

10. Defendants filed various motions to have that decision reconsidered or reheard, all of which

were finally denied by August 11, 1988.

11. Upon motion of the plaintiff, this Court lifted the stay as to the determination of damages, and a hearing on damages based on briefs and submissions of the parties and upon oral testimony and cross-examination, held on September 30, 1988.

12. The plaintiff lost profits it was entitled to on the share of defendants' sales, which plaintiff would have made in reasonable probability, but for the defendants' infringements.

13. Plaintiff was making $42.10 profit per pair of ankle holders prior to defendants' infringement. Defendants' infringement lowered what would have been plaintiff's 100%

market share to 82%. The other 18% was infringement sales.

14. The Teeters sold at least 8,318 pairs of infringing ankle-holders between July 1982 and April 1985. Based on a profit of $42.10 per pair, Gravity Guidance suffered lost profit damages on 82% of defendants' sales. The 82% of defendants' sales of 8,318 pairs is 6,821 pairs. Based on a profit of $42.10 per pair, Gravity Guidance was damaged in the amount of $287,164.00 lost profits.

15. Gravity Guidance also suffered reduced profits. Gravity Guidance's pre-infringement average profit margin was $42.10 per pair.

16. The defendants' infringement on plaintiff's patent and market, wrongfully forced plaintiff to reduce

the wholesale price of its ankle holders from $42.10 per pair to $28.00 per pair, a reduction of $14.10 per pair. As a result, plaintiff was shortchanged profits it could have made if the defendants and other infringers had not violated plaintiff's patent.

17. Gravity Guidance sold 278,288 pair of ankle holders during the defendants' infringing period of August 1982 to April 1985, and held 82% of the market. The infringers market share of 18% represented 83,318 pairs of ankle holders. The Teeters sales of 8,318 pairs represented 9.4% of the 18% of the market not attributable to Gravity Guidance.

18. Gravity Guidance's gross reduced profits for that period is

equal to total plaintiff's sales times reduced profits of $14.10 per pair, or $3,923,861.00.

19. Reduced profits damages attributable to the Teeters is 9.4% of the gross reduced profits to Gravity Guidance. Gravity Guidance is entitled to $368,843.00 in reduced profits.

20. Those remaining 18% of Teeter's sales not attributable to lost or reduced profits are unauthorized infringements and recoverable. The measure of damages for those infringements not attributable to lost profits or reduced profits is a reasonable royalty for each infringement.

21. A reasonable royalty is arrived at by multiplying the number of pairs

sold times a reasonable royalty. The 18% of Teeters' infringing sales equals 1,497 pair of ankle holders.

22. The sum of $20.00 per pair was determined to be a reasonable royalty based on what Gravity Guidance could have charged a licensee. The reasonable royalty to which Gravity Guidance is entitled to for the remaining 18% of the Teeter's infringing sales is $29,940.00 (1,497 x $20.00).

23. Teeters failure to adequately investigate the scope of Gravity Guidances patent prior to beginning manufacture use or sale is evidence of Teeters willful and deliberate infringement of Gravity Guidance's Patents.

24. Teeters willful and deliberate infringement of Gravity Guidance's patent in-suit supports the trebling of actual damages.

25. Gravity Guidance suffered total actual damages in the amount of $685,947.00. When trebled, that amount comes to $2,057,841.00.

26. Gravity Guidance is entitled to prejudgment interest commencing from the date of Teeter's first infringement.

27. Gravity Guidance and/or PMD Corporation borrowed money at 1-1/2% above the prime rate average for the period 1982-1985.

28. Total prejudgment interest is $428,768.00, allocated as follows:

Lost profits:	$ 180,152.00
Reduced profits:	$ 231,358.00
Reasonable royalty:	$ 17,258.00
TOTAL:	$ 428,768.00

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. Insofar as any of the preceding Findings of Fact constitute Conclusions of Law, they are hereby adopted as such.

2. The Court has jurisdiction over the subject matter and the parties herein by reason of Title 28 U.s.C. §1331 and §1338. Venue is proper under U.S.C. §1400.

3. Defendants infringed the patent-in-suit.

4. Defendants made, used, or sold its ankle holders within the United States during the term of the patent.

5. Damages, prejudgment interest, costs, and the award of attorneys fees

are governed by 37 U.S.C. §284 and §285 in patent cases.

6. Plaintiff is entitled to lost profits, reduced profits, and a hypothetical reasonable royalty on Teeter's sales not attributable to lost or reduced profits.

7. Plaintiff is entitled to $287,164.00 in lost profits.

8. Plaintiff is entitled to $368,843.00 in reduced profits.

9. Plaintiff is entitled to a reasonable royalty in the sum of $29,940.00.

10. Defendants' infringement was willful and deliberate.

11. Defendants' willful and deliberate conduct regarding the patent-in-suit make this an exceptional case under 35 U.S.C. §285

and damages shall be trebled under 35 U.S.C. §284. Actual damages, when trebled, amount to $2,057,802.00.

12. Plaintiff is entitled to prejudgment interest on any damage award from the date of first infringement. Total prejudgment interest is $428,678.00.

13. Attorney's fees and costs shall be granted to plaintiffs under 35 U.S.C. §285.

DATED at Tacoma, Washington this 8th day of December, 1988.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 29
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-692

IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Misleading Statements Of Gravity Guidance

At the top of page 3 of the Gravity Guidance Opposition, the summary of Teeter's "Questions Presented for Review" is reasonably accurately summarized with respect to whether the District Court and the Court of Appeals,

> disregarded consideration of the issue of obviousness under 35 U.S.C. § 103;
>
> disregarded the claims in the patent in holding the patent to be valid; and
>
> avoided consideration of the prior art of record when all of the

evidence in the case was documentary in the form of prior U.S. patents.

Then follows vague innuendos without definition or explanation.

At the bottom of page 3 and top of page 4, the Opposition states:

> Teeters mischaracterize the nature of the proceedings below both at the District Court level and the Appellate Court level.

The "mischaracterization" is not identified.

Near the bottom of page 4, the Opposition states that Teeter knew about the Gravity Guidance patent but chose to enter the market "with their infringing product" apparently insinuating that the Teeter product was a carbon copy of the Gravity Guidance product, whereas the District Court found that Teeter did not

literally infringe upon the Gravity Guidance patent rights but infringed only under the doctrine of equivalents (Petition APPENDIX A, p. 2a, items 2 and 3).

The representation of Gravity Guidance at the bottom of page 4 that the trial court and the Court of Appeals found that Teeter was "without any reasonable basis" to enter the market with his "infringing product" is unsupported both by the decision of the District Court and by the decision of the Court of Appeals.

The Opposition continues at the bottom of page 6 with the statement (emphasis supplied):

> Teeters' inaccurately portray the District Court and the Court of Appeals as ignoring fundamental precepts of both the patent law and procedural rules in dealing

with their summary judgment motion for invalidity.

Teeter does indeed portray the District Court and the Court of Appeals as ignoring the fundamental precepts of the patent law by failing to take into consideration the requirements of 35 U.S.C. § 103 mandating that the Court consider the question of obviousness of "an invention" over the prior art, and Gravity Guidance does not explain why Teeter's portrayal of the action of the District Court and the Court of Appeals in this regard is "inaccurate".

Similarly, "proper procedure" would have been for the District Court and the Court of Appeals to apply the requirement of 35 U.S.C. § 103 as to new prior art cited by Teeter in their

procedure of acting on the case, which they did not do. Again, Gravity Guidance does not explain why it considers this noncompliance with procedure mandated by the Supreme Court to be "inaccurately portrayed" by Teeter.

The assertion of Gravity then continues at the top of page 7:

> In fact, as borne out clearly by the record and the respective judgments of Courts, the Trial Court found . . . that the Teeters did not meet their burden of proof of showing invalidity.

The only ruling or finding that the trial court made was in the Order of June 10, 1986 (Petition APPENDIX A, p. 2a) was:

> 5. The patent rights asserted by Plaintiff are valid.

The Opposition continues at the bottom of page 7:

> In kind, the Court of Appeals decision explicitly stated that [emphasis supplied]
>
> > ". . . the District Court correctly determined that Teeter had failed to carry its burden to establish anticipation . . . .

Thus, the Court of Appeals did not adhere to the language of the ruling made by the District Court.

At the top of page 9, the Opposition states (emphasis supplied):

> After due consideration, Gravity Guidance prevailed at the Trial Court level. Quite simply, the Teeters could not and did not meet their high burden of proof.

As pointed out above, the District Court did not make such a finding.

The Opposition then continues on page 9 (emphasis supplied):

> The Appellate Court simply concurred that the Teeters' failed in carrying that burden.

As stated above, the District Court did not make such a statement with which the appellate court could concur. Also this statement of the appellate court specified only anticipation and did not treat the question of "obviousness" under 35 U.S.C. § 103.

The Opposition concludes this discussion at the bottom of page 11 with the statement (emphasis supplied):

> The cases cited by the Teeters, with the implication that either the Trial Court or the Court of Appeals did not follow established case law, are again only conclusory, self-serving characterizations, which are based on their flawed and inaccurate portrayal of the proceedings.

This innuendo is not explained and is strenuously challenged by Teeter.

Questions for Review
Criticized by Opposition

At the middle of page 9, the Opposition states (emphasis supplied):

> The issues the Teeters' now present as alleged questions for review are either inaccurately portrayed or were waived in their two chances before the Trial Court and the Court of Appeals.

As discussed above, while Gravity Guidance makes accusations against the Petition of Teeter, there is no explanation as to in what respect or respects the issues are "inaccurately portrayed" or "were waived". The Opposition does not contend that there was

> any ruling, either by the District Court or by the Court of

Appeals on the question of obviousness under 35 U.S.C. § 103; or

any discussion of the claims of the Martin patent; or

any evidence in the case other than documentary.

Also, the Opposition does not specify how or when any of the three questions presented for review were "waived" by Teeter.

Allegation of Opposition That The Supreme Court is Without Authority To Grant the Petition is Unfounded

At the top of page 2, the Opposition states:

> . . . the alleged issues presented for review do not even approach the special and important reasons which this Court considers in deciding whether review should be taken.

At the bottom of page 9, the Opposition then states:

> To invoke jurisdiction of the Supreme Court of this land, the very Rules of this Court provide that "special and important reasons" must form the basis for consideration for such review. This is neither an ambiguous nor a meaningless standard. There must be a clear, direct and readily apparent conflict in the courts, or an issue of compelling public importance for the court to consider review. The importance must be "to the public as distinguished from" the particular "parties" involved.

It is respectfully submitted that whenever there is a miscarriage of justice in the judicial system, <u>such miscarriage is of "public" importance and concern</u>. This situation is contemplated by Rule 17 of the Supreme Court which states (emphasis supplied):

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

As has been pointed out in Teeter's Petition, the failure of the Court of Appeals

(1) to consider the question of obviousness under 35 U.S.C. § 103,

(2) to consider the claims of the patent in issue and

(3) to reevaluate the documentary evidence

constitutes a drastic departure "from the accepted and usual course of judicial proceedings" in patent cases as established by the Supreme Court and the Court of Appeals for the Federal Circuit.

Moreover, in affirming the judgment of the District Court the majority of the panel of the Court of Appeals "sanctioned such a departure by a lower court" since there is no indication that the District Court considered the question of "obviousness" with respect to invalidity of the patent or considered the claims of the patent.

At the bottom of page 10, the Opposition states that:

> The Teeters' do not specify with clarity what reason they believe merits review by this Court.

It is hoped that the statement immediately above will clarify why Teeter believes that his Petition should be granted sufficiently to be understood by Gravity Guidance.

It is to be noted that Teeter's Petition does not seek that the Supreme Court retry, or even review, the position of the District Court and the affirmance of the Court of Appeals on the merits of the case, but would like the Supreme Court to exercise its power of supervision in the hope that it will direct the Court of Appeals to give consideration to the claims of the patent in light of the requirements for patentability

specified by the statute 35 U.S.C. § 103.

At the bottom of page 10 and top of page 11 the Opposition states:

> . . . it is clear that any of the questions presented for review by the Teeters are not of the urgent or compelling nature for which this Court should exercise its supervision.

The Supreme Court has expounded at length on the importance of 35 U.S.C. § 103 in the fifteen page decision of Graham v. John Deere Co. of Kansas City et al., 383 US 1, 148 USPQ 459 (Sup. Ct. 1966) discussed in the Teeter Petition at pages 16, 17 and 18 and it is unseemly for a Federal Court of Appeals to simply disregard this extremely important aspect of a patent case and also disregard the claims of the patent which are its heart, as

required by 35 U.S.C. § 112, even though the District Court also disregarded the patent claims and the mandate of 35 U.S.C. § 103.

The conduct of the Court of Appeals in failing to correct the erroneous procedure and resultant opinion of the District Court is even less excusable when the dissenting judge of the three-judge panel did consider the question of obviousness at Teeter's APPENDIX C, page 8a, and considered the claims at page 10a to 12a.

While the Opposition states at the top of page 12:

> . . . Teeters' Petition for Certiorari is devoid of any special or important reason for the Court to entertain review.

it is again emphasized that the Petition does not contemplate the

Supreme Court reviewing the merits of this litigation, but only hopes that the Supreme Court will exercise its power of supervision to direct the Court of Appeals to perform its function properly.

The Opposition comments at the middle of page 13 that (emphasis supplied):

> There is no preeminent or universally important law which has been decided or have been breached in the Courts below . . . .

That is precisely the crux of the Teeter position. The "important law" 35 U.S.C. § 103 was not decided by the courts below but appears not to have been considered by those courts.

Assertion of Gravity Guidance
That Teeter's Position is Frivolous

Gravity Guidance seeks "appropriate damages" for Teeter bringing his Petition stating at the bottom of page 13 of the Opposition:

> Under Supreme Court Rule 49.2, it is submitted that Teeters' petition is friv[o]lous.

The word "frivolous" according to Webster's Third New International Dictionary, Unabridged, G. & C. Merriam Company, Publishers, Springfield, Massachusetts, 1981, means:

> 1 : of little weight or importance : having no basis in law or fact . . . .

Certainly, Teeter's Petition, Supplemental Brief and Reply to the Opposition of Respondent sets forth ample basis in law for supporting the Petition.

Moreover, Teeter does not consider that being saddled with a judgment of almost 2-1/2 million dollars plus attorney's fees, which resulted from what the dissenting judge of the Court of Appeals (Petition APPENDIX C, p. 7a) considered to be an improper decision by the majority of the panel and by the District Court, is a matter

> . . . of little weight or importance . . . .

so as to be "frivolous".

DATED this 27th day of December, 1988.

Respectfully submitted,

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